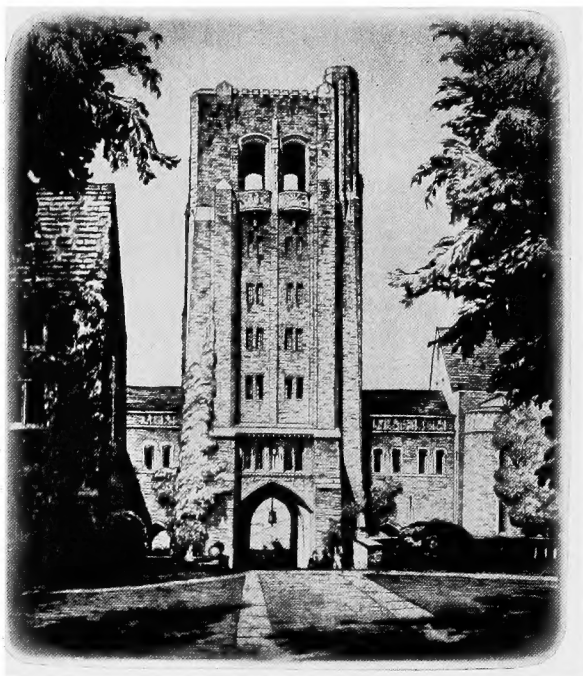




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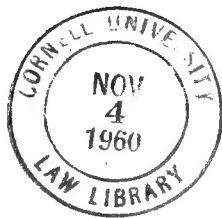
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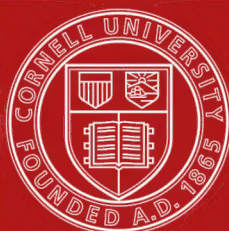
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HANDBOOK

ON THE

LAW OF EXECUTORS AND  
ADMINISTRATORS

---

By SIMON GREENLEAF CROSWELL,

Editor of "Greenleaf on Evidence," "Washburn on Real Property," "Washburn on Easements  
and Servitudes," and Author of "Electricity" and "Patent Cases."

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## PUBLISHERS' PREFACE.

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This latest work of Simon Greenleaf Croswell's is upon a subject with which long study has made him especially familiar. In 1889 he published a one-volume treatise upon the same subject, and his preparatory study for that work naturally put him into the mental attitude to note and assimilate the further developments of the law in that direction. He was therefore peculiarly well qualified to write the treatise upon *Executors and Administrators* for the Hornbook Series. Much of the material in his earlier book has been incorporated into this new work, though, from the special features required in the Hornbook Series, an entirely different handling of the subject and an entirely different arrangement of the material were necessary.

St. Paul, February 1, 1897.

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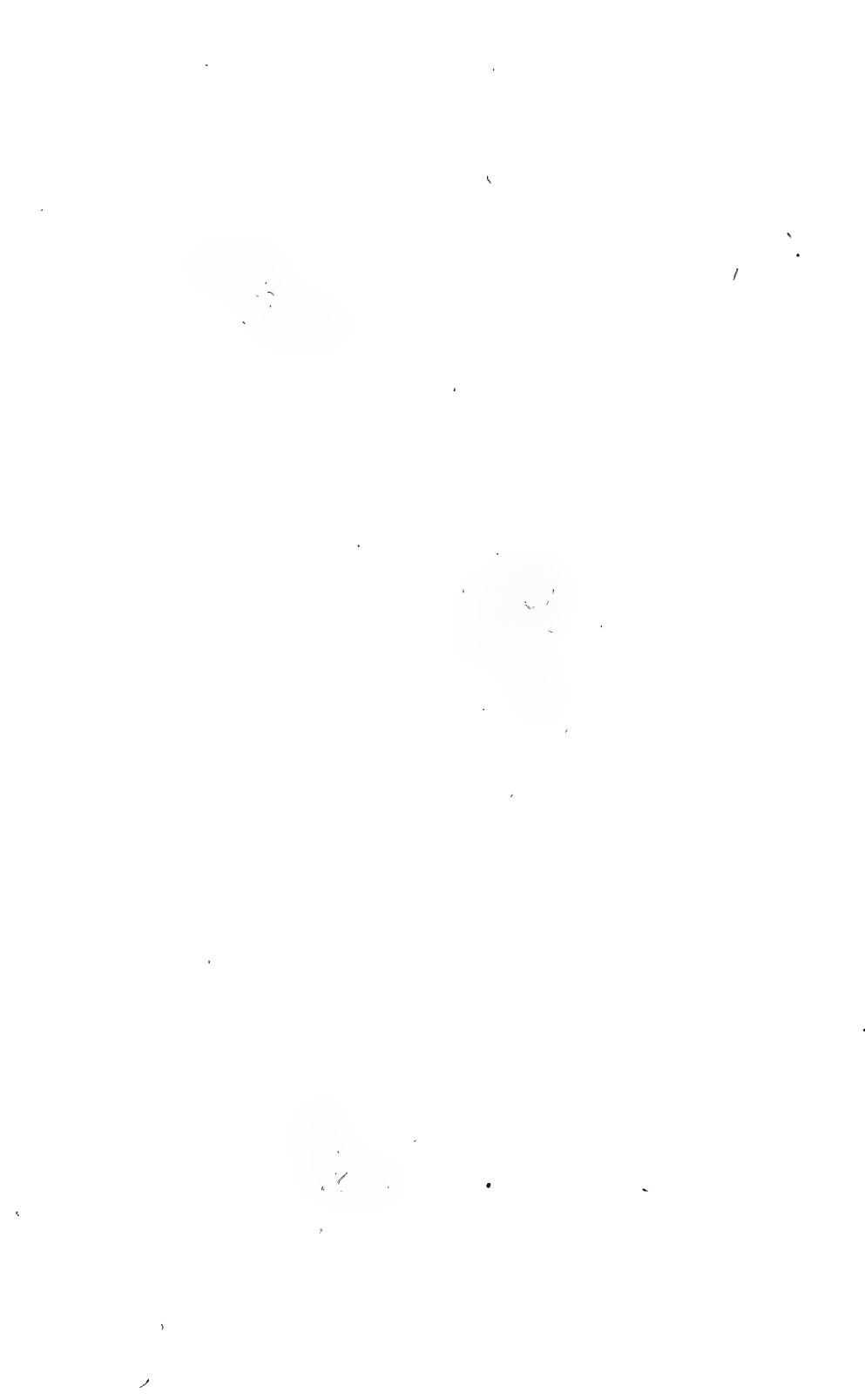
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Part I.

DEFINITIONS AND DIVISION OF SUBJECT.

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# HANDBOOK

OF THE LAW OF

## EXECUTORS AND ADMINISTRATORS.

---

### CHAPTER I.

#### DEFINITIONS AND DIVISION OF SUBJECT.

1. Definition of an Executor.
2. Definition of an Administrator.
3. Division of the Subject.

#### DEFINITION OF AN EXECUTOR.

1. **An executor is the person to whom the execution of the last will or testament of personal estate is by the testator's appointment confided.**

This definition is given by the best writers on testamentary law.<sup>1</sup> Another definition from Swinburne, an early writer on the same subject, is as follows: "To appoint an executor is to place one in stead of the testator, who may enter to the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels towards the payment of the testator's debts and the performance of his will."<sup>2</sup> Another definition is given in Wharton's Law Lexicon, as follows: "An executor is a person appointed by a testator to carry out the donations and requests in his will, and to dispose of the property according to his

<sup>1</sup> Bouv. Law Dict.; 1 Williams, Ex'rs, 226; 2 Bl. Comm. 503.

<sup>2</sup> Swinb. pt. 4, § 2, pl. 2.

testamentary provisions after his decease."<sup>3</sup> This last definition accords best with the probate law of the United States, as it does not limit the office of executor to personal estate, but extends it generally over the whole property of the testator.

### *Origin of Wills.*

The origin of the power of making a will and appointing an executor in England is involved in some obscurity. The power of bequeathing is said to have been coeval in that country with the first rudiments of the law, and there are no traces of a time when it did not exist.<sup>4</sup> Mention is made of intestacy, in the old law before the Conquest, as being merely accidental,<sup>5</sup> and the jurisdiction of probate was then in the county courts, and wills were not regarded as of ecclesiastical consueance sua natura, but only such wills as were made for pious uses.<sup>6</sup> The bishop and the sheriff originally sat together in the county court, and among other matters took cognizance of the probate of wills.<sup>7</sup> William the Conqueror, by charter, separated the jurisdiction of the bishops from that of the lay officers, and forbade each to interfere with the courts or proceedings of the other, thus establishing two courts, and giving rise to the ecclesiastical jurisdiction, but he makes no mention of probate of wills as belonging to either court.<sup>8</sup> Although it does not appear how the bishops and lay officers divided their jurisdiction after this law, yet that of wills, it seems, went wholly to the bishops and clergy,<sup>9</sup> and by the time of Henry II., or, according to Sir H. Spelman, in the reign of Henry I., this jurisdiction seems to have been well recognized,<sup>10</sup> and continued until the probate act.<sup>11</sup>

<sup>3</sup> Whart. Law Dict. "Executor." See, also, Abb. Desc. Wills & Adm. §§ 101, 104, et seq.

<sup>4</sup> 2 Bl. Comm. 491.

<sup>5</sup> L. L. Canut, c. 68.

<sup>6</sup> Swinb. pt. 6, § 11, p. 772, note; Fonbl. Eq. bk. 4, pt. 1, c. 1, § 1.

<sup>7</sup> L. L. Edgar, c. 5; L. L. Canut, c. 17; Swinb., supra.

<sup>8</sup> Swinb., supra; Fonbl. Eq., supra.

<sup>9</sup> Fonbl. Eq. bk. 4, pt. 1, c. 1, § 1.

<sup>10</sup> Fonbl. Eq., supra, note (b); Hensloe's Case, 9 Coke, 33.

<sup>11</sup> (1857) 20 & 21 Vict. c. 77.

## DEFINITION OF AN ADMINISTRATOR.

2. An administrator is a person authorized by a competent court to manage and distribute the estate of an intestate, or of a testate who has no executor.

This definition is given in Bouvier's Law Dictionary,<sup>12</sup> except the phrase "by a competent court." This phrase is necessary to the completion of the definition, for the administrator derives all his authority from the court which appoints him, as will be seen later. The executor and administrator, under the old English practice, had to do only with the personal estate of the decedent.<sup>13</sup> In many cases, however, executors are given by the will estates in and powers over real property, and by statute executors and administrators are given powers of sale of real property for the purpose of obtaining funds to pay debts of the decedent.<sup>14</sup> In many of the United States the statutes have gone further, and have expressly included real estate, either in fee or a temporary estate during administration, as part of the estate which the executor or administrator is obliged to account for and distribute. This matter will be discussed later.<sup>14</sup>

*Origin of Administration.*

In England, in early times, if a man died intestate and had made no disposition of his goods, nor committed the trust to any, the king, as *parens patriæ*, used to seize, by his ministers, the goods of the intestate, to the intent that they should be preserved and disposed of for the burial of the deceased, for the payment of his debts, to advance his wife and children, if he had any, and, if not, those of his blood.<sup>15</sup> Afterwards this care and trust was committed to the ordinaries, officers of the church, on the ground that none could be found more fit to have such care and charge of his transitory goods, after the death of the intestate, than the ordinary who all his life

<sup>12</sup> Bouv. Law Dict.; *Neale v. Hogthrop*, 3 Bland (Md.) 564. See Abb. Desc. Wills & Adm. § 107.

<sup>13</sup> Post, c. 16, p. 280.

<sup>14</sup> Post, c. 14, p. 207.

<sup>15</sup> *Hensloe's Case*, 9 Coke, 38b; 2 Bl. Comm. 494. See Abb. Desc. Wills & Adm. § 94 et seq.



had charge of his immortal soul.<sup>16</sup> The ecclesiastics, however, it is said, did not use the goods thus intrusted to them for such purposes, but diverted them to the uses of the church, reserving to such pious uses one-third of the goods of the intestate, and not paying any debts of his estate.<sup>17</sup> This abuse was the cause of the statute of Westminster II.,<sup>18</sup> by which it was provided that when the goods of a deceased intestate came into the hands of the ordinary he should be bound to pay the debts of the deceased so far as the goods sufficed, just as if he had been executor of the will of the deceased. Although the ordinary was thus compelled to pay the debts of the deceased, he still was able to retain a large part of the estate for the church, and the flagrant abuse of this power is said to have occasioned the interposition of the legislature, and the removal of the whole power of administration from the ordinaries,<sup>19</sup> and the enactment of a statute<sup>20</sup> which provided that in case of intestacy the ordinary should depute of the next and most lawful friends of the deceased to administer his goods, which persons so deputed should have action to demand and recover, as executors, the debts due to the deceased, in the king's court, and should answer in the king's court to others to whom the deceased was holden and bound, in the same manner as executors, and should be accountable to the ordinaries as executors are. This jurisdiction over administrations remained in the ecclesiastical courts till the probate act of 1857,<sup>21</sup> by which that jurisdiction was vested in the queen, to be exercised in her name by a court of probate.

<sup>16</sup> Hensloe's Case, 9 Coke, 39a; Graysbrook v. Fox, Plow. 277a.

<sup>17</sup> Decret (Pope Innocent IV.) 1, 5.

<sup>18</sup> (1285) 13 Edw. I. c. 19.

<sup>19</sup> 2 Bl. Comm. 494.

<sup>20</sup> (1357) 31 Edw. III. c. 11.

<sup>21</sup> (1858) 20 & 21 Vict. c. 77, §§ 3, 4.

DIVISION OF THE SUBJECT.

3. The law of executors and administrators will be considered in this treatise in the following divisions:

- (a) Appointment and qualifications of executors and administrators, including,
  - (1) Appointment in court.
  - (2) Place and time of appointment.
  - (3) Who may claim appointment as executor.
  - (4) Who may claim the right to administer.
  - (5) Right of next of kin and others to administer.
  - (6) Disqualifications for the office.
  - (7) Acceptance or renunciation of the office.
  - (8) Proceedings for appointment.
  - (9) Special administration.
  - (10) Foreign and interstate administration.
  - (11) Joint administrations.
  - (12) Administration bonds.
- (b) Powers and duties of executors and administrators, including,
  - (1) Inventory and appraisement of estate.
  - (2) Assets of estate.
  - (3) Management of estate.
  - (4) Sales of personal and real property.
  - (5) Payment of debts.
  - (6) Payment of legacies.
  - (7) Distribution of intestate estates.
  - (8) Administration accounts.
- (c) Termination of the office by removal, revocation, or resignation.
- (d) Remedies pertaining to the office, including,
  - (1) Actions by executors and administrators.
  - (2) Actions against executors and administrators.
  - (3) Statute of Limitations—Set-off.
  - (4) Evidence and costs.



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## Part II.

# APPOINTMENT AND QUALIFICATIONS.

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CROSW. EX'RS.

(9)\*



## CHAPTER II.

### APPOINTMENT IN COURT.

4. When Administration in Court is Necessary.
5. Necessity of Appointment by Court.
- 6-8. Courts Having Jurisdiction of Executors and Administrators.
9. Interest of the Judge Disqualifies.
10. Conclusiveness of Decrees of Probate Courts.
11. Administration on Estate of Person Still Alive.
12. Presumption of Regularity.
13. Decrees of Probate Courts in Other States.

### WHEN ADMINISTRATION IN COURT IS NECESSARY.

4. The estate of a decedent must always be administered in court, except—

**EXCEPTIONS—**(a) In some states, by statute, a testator may provide for administration in pais.

(b) In cases of intestacy no administration is necessary when

- (1) The creditors and distributees so agree, and
- (2) No formal transfer of title or suit to recover possession of the property is necessary.

Whenever deceased left a will, appointing an executor, the will must be executed in the probate courts, unless, by statute, the executor may execute it in pais. When no will is left, and there are no creditors of the estate or the creditors agree, distribution of the estate may be had without recourse to the probate courts, by agreement of all interested parties, being of full age and competent, provided no necessity exists for bringing suit to collect the property or for other purposes, or for formal transfer of title. The existence of a will appointing an executor generally renders it necessary for the estate to be settled through the medium of the probate courts, which alone have cognizance of such matters, although in several states statutes have been passed which provide that if the testator so requests in his will the will may be carried out by the executor without any probate, or with probate and without further proceedings

in court, according as the special statute may be worded.<sup>1</sup> So it has been held, in a state where, by statute, a will may be executed independently of the court, if it is probated and recorded, and an inventory, appraisement, and list of claims returned, that the executor may sue on his title under the will, though he has not filed any inventory or affidavit, for his capacity and title as executor are complete on the probate.<sup>2</sup>

In the case of intestate estates, there is no reason why the estate should be put to the expense and delay of taking out administration in cases where it is in such shape that this mode of settlement can be employed without injustice or irregularity. Therefore, if there are no creditors, and all the parties entitled to the estate as distributees are of age and competent to transact business, and agree to divide up the estate without taking out administration, and the property is of such kind as not to require formal transfers, e. g. such as would be necessary in transferring shares of stock in corporations or deposits in savings banks, and is in the possession of the distributees, so that no suit at law is necessary in order to recover possession of it, then, by agreement among the persons entitled to distribution, the estate may be divided up among them without the appointment of any administrator.<sup>3</sup> In such a case an administrator would be a mere trustee, whose only duty would be to divide up the property

<sup>1</sup> Patten v. Cox, 29 S. W. 182, 9 Tex. Civ. App. 299; Moore v. Bryant (Tex. Civ. App.) 31 S. W. 223; Miller v. Borst, 39 Pac. 662, 11 Wash. 260; Newport v. Newport, 31 Pac. 428, 5 Wash. 114.

<sup>2</sup> Patten v. Cox, 29 S. W. 182, 9 Tex. Civ. App. 299.

<sup>3</sup> McCracken v. McCaslin, 50 Mo. App. 87; Amis v. Cameron, 55 Ga. 449; Pratt v. Manhattan Life Ins. Co., 17 South. 341, 47 La. Ann. 855; Norman v. Buckner, 10 Sup. Ct. 835, 135 U. S. 500; Catlin v. Huestis, 11 Ohio Cir. Ct. R. 120, 5 Ohio Dec. 23; Taylor v. Phillips, 30 Vt. 238; Babbitt v. Bowen, 32 Vt. 437; Needham v. Gillett, 39 Mich. 574. In a number of states statutes have been passed with a view to relieving persons inheriting property from the expense and trouble of administration, especially when the amount of property is small. Thus, in Maine, if the personal estate does not amount to \$20 in value it goes to the widow, or, if there is no widow, to the next of kin, without administration. Rev. St. c. 64, § 1. So, in Florida (Laws 1883; c. 3434, § 1), where the estate is not indebted, and the heir is sole, or the heirs agree among themselves. In Maryland (Laws 1882, c. 477), if a married woman leaves no descendants and no debts, the title to the personal property devolves on the husband without administration, even where she holds



among those entitled to it, and, as there is no dispute as to how this division should be made, it would be a waste of the estate to go through the form and expense of administration, against the will of the heirs.<sup>4</sup> If distribution is once made under such an agreement, none of the distributees can afterwards require administration, because of the estoppel of their agreement to divide without administration.<sup>5</sup> If, however, there are any creditors of the estate who are not satisfied with this method of settling the estate, and insist on the appointment of an administrator, they can compel this to be done, or, in default, can take administration themselves, as will be seen later,<sup>6</sup> since they are entitled to have some one appointed representing the estate whom they can sue for their claims, or else to be themselves placed in such a position that as administrators they can satisfy their own claims. If any part of the estate is in the hands of third parties, who refuse to give it up, so that suit is necessary, or if any formal transfer of any portion of the estate is necessary, as in case of stock in corporations, registered bonds, savings-bank deposits, and the like, administration must be taken out, so that there may be some one in whom the legal title to the property is vested, and who will be recognized by the courts in an action at law, and whose transfers will protect interested parties.<sup>7</sup> In cases where the property belonging to the estate is distributed among those who are legally entitled to it without any administration the title of each distributee is merely possessory, unless such distribution is made by statutory authority, since the legal title to the property can only vest in an administrator; but this possessory title is good against trespassers, and, if there are no others having any better title to the goods the possessory title is practically a good title.

As to real estate, the title vests directly in the heirs, unless other-

that property as separate estate under the Code. *Willis v. Jones*, 42 Md. 422. In Georgia (Laws 1882-83, tit. 5, No. 380, § 6) the widow may take possession without administration if there are no debts. *Id.* tit. 4, No. 52. And a claim for unliquidated damages, even though meritorious, is not such a debt as will prevent the widow from taking the property without administration. *McElhaney v. Crawford*, 22 S. E. 895, 96 Ga. 174.

<sup>4</sup> *McCracken v. McCaslin*, *supra*.

<sup>5</sup> *Id.*

<sup>6</sup> *Post*, p. 82, c. 5.

<sup>7</sup> *Adey v. Adey*, 58 Mo. App. 408; *Baird v. Brooks*, 65 Iowa, 40, 21 N. W. 163.

wise ordered by statute, immediately upon the death of the owner, and they may exercise all their rights without any administration. Thus, if the owner has sold land and retains a vendor's lien thereon for the price, and dies, the heirs may enforce the lien in equity without the appointment of any administrator.<sup>8</sup>

If there is no property of the deceased, the appointment of an administrator is of course unnecessary.<sup>9</sup> As to whether an appointment in such a case is possible, the cases differ, and the subject will be discussed further on.<sup>10</sup>

### NECESSITY OF APPOINTMENT BY COURT.

**5. Executors and administrators must be appointed to the office, by a decree of a court which has jurisdiction of such matters, before their office with its powers and duties comes into full effect.**

\* An executor, in England, is considered as having certain powers of action under the will before it is probated, and a few attempts have been made to sustain the same position in the United States, as will be seen later;<sup>11</sup> but in all essential points it is well settled here that the office of an executor, as well as that of an administrator, is created and made operative by the decree of the probate or other court of competent jurisdiction appointing him.<sup>12</sup> Until he has received appointment by the probate court, and has qualified by giving bond, even an executor cannot do any acts in interference with the estate, except such as will merely preserve the property.<sup>13</sup>

<sup>8</sup> McGhee v. Alexander (Ala.) 16 South. 148. See post, c. 22.

<sup>9</sup> Summerlin v. Rabb (Tex. Civ. App.) 31 S. W. 711; Mallory's Estate v. Railroad Co., 36 Pac. 1059, 53 Kan. 557.

<sup>10</sup> Toledo, St. L. & K. C. R. Co. v. Reeves, 35 N. E. 199, 8 Ind. App. 667. See post, p. 39, c. 3.

<sup>11</sup> See post, p. 247, c. 15; Id. p. 443, c. 22; Mechem, Cas. Succ. p. 137.

<sup>12</sup> See post, p. 247, c. 15; Id. p. 443, c. 22.

<sup>13</sup> Wall v. Bissell, 125 U. S. 382, 8 Sup. Ct. 979; Monroe v. James, 4 Munf. (Va.) 194; Martin v. Peck, 2 Yerg. (Tenn.) 298; Cleveland v. Chandler, 3 Stew. (Ala.) 489; Carpenter v. Going, 20 Ala. 587; Kittredge v. Folsom, 8 N. H. 98, 111; Rand v. Hubbard, 4 Metc. (Mass.) 252, 257; Gay v. Minot, 3 Cush. (Mass.) 352; Staggs v. Green, 47 Mo. 500; Hartnett v. Wandell, 60 N. Y. 346, 350.

### COURTS HAVING JURISDICTION OF EXECUTORS AND ADMINISTRATORS.

6. As a general rule, there are special courts having jurisdiction of executors and administrators, and consisting of a judge and clerk acting without a jury.
7. In some states there are general courts of probate, which establish rules of practice and have appellate jurisdiction in probate matters.
8. The power of a probate judge, except as to ministerial acts, is confined to acts done within his own county or district.

The courts which have jurisdiction over the probate of wills, the appointment of executors and administrators, the settlement of estates, distribution among personal representatives and legatees, and other like administrative acts, are variously named in the different states, as, for instance, probate courts, surrogates' courts, orphans' courts, courts of ordinary, or county courts. These courts will be considered collectively in this work under the general name of probate courts, unless special reasons render some more specific term necessary.

These courts are ordinarily composed of a judge and clerk for each county or other local division, one person sometimes performing the duties of both offices.<sup>14</sup> The judge has original jurisdiction of such matters as properly come before the probate court of that county, and decides them generally without the intervention of a jury. He has also the usual auxiliary powers of courts, such as to issue warrants, to summon witnesses, and perform such other judicial acts as are necessary to the proper execution of his office. The judges of

<sup>14</sup> The probate courts are successors, in general characteristics of jurisdiction, of the ecclesiastical courts in England, to which reference has been made, although the mode of procedure has been largely changed by statutory provisions in the various states. *Peters v. Peters*, 8 Cush. (Mass.) 541, Shaw, C. J.; *Blackinton v. Blackinton*, 110 Mass. 462; *Cecil v. Cecil*, 19 Md. 79; *Graham v. Hough-talin*, 30 N. J. Law, 560; *Hayes v. Hayes*, 48 N. H. 226; *Finch v. Finch*, 14 Ga. 366; *McWillie v. Van Vacter*, 35 Miss. 442.

the various counties, either separately or together, or in some cases by order of a supreme court of probate, usually establish the forms of petition, and make various rules of practice adapted to secure both the proper transaction of business in their respective courts, and uniformity, so far as is practicable, throughout the state.<sup>15</sup> The local jurisdiction of each probate judge ordinarily extends only over the county or other district for which he is appointed, but it is sometimes provided by statute that he may exchange with other judges when it is found necessary or convenient, and also that in cases where any judge is unable to act or is absent, and no other judge acts for him, or if there is a vacancy in office, the clerk may designate some other judge, who shall act in that county pro tempore. Except as thus authorized, any act by a judge of probate out of the county or district for which he is appointed is void, unless of a merely ministerial nature, such as signing a blank writ.<sup>16</sup> The duty of recording the proceedings and decrees of the court, as well as preserving papers filed in court, and other similar duties, are intrusted to a clerk, sometimes called a "register of probate."<sup>17</sup> An appeal from the decree of a county judge of probate is ordinarily provided to some general court of probate whose jurisdiction is appellate from the various counties in the whole state.

#### INTEREST OF THE JUDGE DISQUALIFIES.

9. No judge should hear any case in which he has an interest, either pecuniary, personal, or by affinity or consanguinity to any of the parties. If he has such interest, he should refuse jurisdiction, and the case should be heard and decided by some other judge acting for him.

Any pecuniary or proprietary interest in the judge is sufficient to deprive him of the right to exercise jurisdiction.<sup>18</sup> Thus, if he is a creditor or debtor of the estate, or heir or legatee, he should not act

<sup>15</sup> *Baker v. Blood*, 128 Mass. 543; *Chase v. Hathaway*, 14 Mass. 227.

<sup>16</sup> *Capper v. Sibley*, 23 N. W. 153, 65 Iowa, 754; *Lee v. Wells*, 15 Gray (Mass.) 459.

<sup>17</sup> *Chase v. Hathaway*, 14 Mass. 227.

<sup>18</sup> *Cottle, Appellant*, 5 Pick. 483, per Morton, J.

in any proceeding that affects his interest,<sup>19</sup> or if he has an equitable interest as cestui que trust,<sup>20</sup> or is executor of a legatee;<sup>21</sup> but the fact that the will contains a legacy in trust for the poor of the town where the judge resides does not disqualify him.<sup>22</sup> In an early case it was said that, although it was contrary to statute for the judge to act as agent or attorney of an heir or person interested in an estate within his jurisdiction, yet this was not such an interest as would deprive him of jurisdiction over the estate.<sup>23</sup> A judge of probate who advises an executor as counsel, and whose bill for services is part of an executor's account, should not pass upon that account, and if he assumes to do so his acts are void.<sup>24</sup> But if he has merely acted as counsel for a testator, and his employment has terminated before the death of the testator, he is not disqualified for taking jurisdiction of the case, even though he may be an important witness upon the probate of the will, if he is not a subscribing witness.<sup>25</sup> When the judge's interest is a pecuniary one, it may be relinquished or extinguished, and in that case his authority revives.<sup>26</sup> Thus, if the estate is insolvent, and the judge does not

<sup>19</sup> Cottle, Appellant, 5 Pick. (Mass.) 483; Gay v. Minot, 3 Cush. (Mass.) 352; Northampton v. Smith, 11 Metc. (Mass.) 390. In one case it was held, in the supreme court of New York, that a surrogate who received the money comprising the estate for safe custody pending proceedings before him, and converted it wrongfully to his own use, was thereby made a debtor of the estate, and was disqualified to act (In re Hancock, 27 Hun, 78); but this was reversed on appeal on ground of public policy (91 N. Y. 284).

<sup>20</sup> Sigourney v. Sibley, 21 Pick. (Mass.) 101.

<sup>21</sup> Bacon, Appellant, 7 Gray (Mass.) 391.

<sup>22</sup> Northampton v. Smith, 11 Metc. (Mass.) 390. The fact that the judge is surety on the bond of a temporary administrator does not prevent him from passing upon the acts of such person as regular administrator, as the interests are wholly separable. Halbert v. Martin (Tex. Civ. App.) 30 S. W. 338.

<sup>23</sup> Cottle, Appellant, 5 Pick. (Mass.) 483.

<sup>24</sup> Wigand v. Dejonge, 8 Abb. N. C. (N. Y.) 260.

<sup>25</sup> People v. Weiant, 30 Hun (N. Y.) 475: The cases are not wholly uniform on this point. It was held that a judge who has written or drawn up a will is disqualified to probate it. Moses v. Julian, 45 N. H. 52. Also that a judge who is a subscribing witness may take probate of the will. Patten v. Tallman, 27 Me. 17. But a judge who is executor of a will certainly cannot properly perform both duties. Bedell v. Bailey, 58 N. H. 62.

<sup>26</sup> Sigourney v. Sibley, 21 Pick. (Mass.) 101; Bacon, Appellant, 7 Gray (Mass.) 391; Aldrich, Appellant, 110 Mass. 189, 193.

prove his claim before the commissioners, his claim is barred, and his acts are valid.<sup>27</sup> For similar reasons a near relationship to any of the parties to the proceedings, or to persons directly or apparently interested in them, disqualifies the judge from acting in any proceedings which affect their interests. Thus, he should not act upon the application of his brother-in-law for appointment as administrator,<sup>28</sup> nor upon the settling of an account if his father-in-law, being a creditor of the estate, becomes a party to the proceedings in settlement; but the fact that a near relative is a creditor of the estate, if such relative has not become a party to the proceedings, does not deprive the judge of his jurisdiction.<sup>29</sup> The closeness of the relationship affects this disqualification. Thus, it has been held that the judge is not incompetent to appoint an administrator cum testamento annexo of the estate of his uncle's wife,<sup>30</sup> nor to take jurisdiction of an estate of which his nephew's wife is a distributee and legatee.<sup>31</sup> If the judge's wife is interested in the estate both as heir and legatee, such an interest disqualifies the judge to act.<sup>32</sup>

In all cases where a judge of probate assumes to act in a matter for which he is disqualified by interest his acts are void, and may be shown to be so in collateral proceedings.<sup>33</sup> Even the appointment of a special administrator is void.<sup>34</sup> But the judge may act in any proceedings in the case which plainly do not affect his interest, and his acts will so far be valid. Thus, it was held that, where a judge's only interest arose from the fact that his father-in-law was a principal creditor of the estate, the judge was not disqualified from probating the will, and although his appointment of

<sup>27</sup> Cottle, Appellant, 5 Pick. (Mass.) 482, 483.

<sup>28</sup> Hall v. Thayer, 105 Mass. 219.

<sup>29</sup> Aldrich, Appellant, 110 Mass. 189, 192.

<sup>30</sup> Russell v. Belcher, 76 Me. 501.

<sup>31</sup> Nettleton v. Nettleton, 17 Conn. 542.

<sup>32</sup> Perkins v. George, 45 N. H. 453.

<sup>33</sup> Wigand v. Dejonge, 8 Abb. N. C. (N. Y.) 260; Moses v. Julian, 45 N. H. 52; Bedell v. Bailey, 58 N. H. 62; Coffin v. Cottle, 9 Pick. (Mass.) 287; Gay v. Minot, 3 Cush. (Mass.) 352; Hall v. Thayer, 105 Mass. 219; Aldrich, Appellant, 110 Mass. 189, 193; Sigourney v. Sibley, 21 Pick. (Mass.) 101.

<sup>34</sup> Sigourney v. Sibley, 22 Pick. (Mass.) 507.

his brother-in-law as administrator de bonis non was void, yet the probate of the will which was taken at the same time was valid.<sup>35</sup>

#### CONCLUSIVENESS OF DECREES OF PROBATE COURTS.

10. The following general rules as to the conclusiveness of decrees of probate courts are established by the weight of authority:

- (a) If the subject-matter was within the general jurisdiction of the court, the decree is conclusive, and cannot be questioned in collateral proceedings.
- (b) If the subject-matter was not within the jurisdiction of the court, the decree is void, and may be shown to be so in collateral proceedings.
- (c) If the probate record recites all jurisdictional facts necessary, no proof is admissible in a collateral action to contradict these recitals except—

**EXCEPTION**—In case of administration on estate of living person.

- (d) If any necessary jurisdictional fact is not recited in the record, lack of jurisdiction may be shown collaterally, unless such proof contradicts the record inferentially or directly.
- (e) If the record recites facts which show a lack of jurisdiction, this may be availed of in collateral proceedings.

There has been some discussion in the cases as to what is the nature of the jurisdiction of probate courts as affecting the conclusiveness of their decrees when questioned in collateral proceedings. Although the jurisdiction of the probate court is generally granted by and dependent upon statutes in the United States, yet the court, as established by the statutes, is in almost every instance required to keep records of its proceedings, and is therefore a court of record.<sup>36</sup>

<sup>35</sup> Aldrich, Appellant, 110 Mass. 189.

<sup>36</sup> Tebbets v. Tilton, 24 N. H. 124; Chase v. Hathaway, 14 Mass. 227; Morgan v. Dodge, 44 N. H. 258; Rev. St. Me. c. 64, § 1; Carlisle v. Carlisle, 10 Md. 448; Dozier v. Joyce, 8 Port. (Ala.) 311; Allen v. Clark, 2 Black (Ind.) 344.

Moreover, although the jurisdiction of the court is in some senses limited, yet it is not a court of inferior jurisdiction, and the rules as to the effect of its decrees in collateral proceedings are as shown in the black-letter text.

<sup>1</sup> These rules cannot be said to be universally followed, especially in the earlier cases, and it was held in many early decisions that, the probate court being a court of inferior and limited jurisdiction, proof might be given in collateral proceedings to show that its acts were without jurisdiction, even though such proof might contradict the recitals of jurisdictional facts in the decree of the court. Thus, it was held that proof might be given that the deceased resided in a different county from that in which the executor or administrator was appointed, though the proceedings in the probate court recited the residence of the deceased in the county where the appointment was taken out.<sup>37</sup> The later cases, however, follow the rules stated above.<sup>38</sup>

<sup>37</sup> *Beckett v. Selover*, 7 Cal. 234; *Cutts v. Haskins*, 9 Mass. 543; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; *First Nat. Bank of New Haven v. Balcom*, 35 Conn. 358.

<sup>38</sup> *Simmons v. Saul*, 11 Sup. Ct. 369, 138 U. S. 439; *Robinson v. Fair*, 9 Sup. Ct. 30, 128 U. S. 53, 86; *Eller v. Richardson*, 15 S. W. 650, 89 Tenn. 575; *Vinet v. Bres* (La.) 20 South. 693; *East Tennessee, V. & G. R. Co. v. Mahoney*, 15 S. W. 652, 89 Tenn. 311; *Saul v. Frame*, 22 S. W. 984, 987, 3 Tex. Civ. App. 596; *Chapman v. Brite*, 23 S. W. 516, 4 Tex. Civ. App. 506; *Moore's Estate v. Moore*, 50 N. W. 443, 33 Neb. 509; *Plume v. Institution*, 46 N. J. Law, 211; *Andrews v. Avory*, 14 Grat. (Va.) 229; *Coltart v. Allen*, 40 Ala. 155; *Gray v. Cruise*, 36 Ala. 561; *Broughton v. Bradley*, 34 Ala. 694; *Irwin v. Scriber*, 18 Cal. 499; *Brodrigg v. Tibbits*, 63 Cal. 80; *In re Griffith's Estate*, 23 Pac. 528, 84 Cal. 107; *Dickinson v. Hayes*, 31 Conn. 422; *Potwine's Appeal*, Id. 381; *Clarkson v. Beardsley*, 45 Conn. 197; *Clement v. Brainard*, 46 Conn. 184; *Tant v. Wigfall*, 65 Ga. 412; *Raborg v. Hammond*, 2 Har. & G. (Md.) 42; *Shultz v. Houck*, 29 Md. 26; *Lum v. Reed*, 53 Miss. 78; *Weir v. Monahan*, 7 South. 291, 67 Miss. 434; *Tebbetts v. Tilton*, 31 N. H. 238; *Ryno's Ex'r v. Ryno's Adm'r*, 27 N. J. Eq. 524; *O'Connor v. Huggins*, 21 N. E. 184, 113 N. Y. 511; *Harrison v. Clark*, 87 N. Y. 576; *Lowman v. Railroad Co.*, 32 N. Y. Supp. 579, 85 Hun, 188; *Wilson v. Gaston*, 92 Pa. St. 207; *Granbery v. Mhoon*, 1 Dev. (N. C.) 456; *Shroyer v. Richmond*, 16 Ohio St. 465; *People's Sav. Bank v. Wilcox*, 3 Atl. 211, 15 R. I. 258; *Brown v. Gibson*, 1 Nott. & McC. (S. C.) 326; *Hendrick v. Cleaveland*, 2 Vt. 329; *McFarland v. Stone*, 17 Vt. 165; *Franks v. Chapman*, 60 Tex. 46; *Garrett v. Boeing*, 15 C. C. A. 209, 68 Fed. 51; *McCants v. Land Co.*, 15 C. C. A. 225, 68 Fed. 66; *Comstock v. Crawford*, 3 Wall. 396, 403. It may be noted that the case of



Thus, it is said that the jurisdiction of the probate court in the matter of the grant of letters testamentary and of administration is original, general, and unlimited, and it is to that extent a court of general, not of limited and special, jurisdiction.<sup>39</sup> In California, the decrees of the probate court are now by statute given the effect of decrees of a court of general jurisdiction, and the benefit of the same presumption, and the jurisdiction cannot be questioned collaterally.<sup>40</sup> So, in other states it is said the decrees of probate courts in regard to matters within their jurisdiction stand on the same footing as those of courts of common law,<sup>41</sup> and are conclusive, and cannot be attacked in collateral proceedings.<sup>42</sup> In Rhode Island

*Beckett v. Selover*, cited in note 37, was overruled in a later case (*Irwin v. Scriber*, 18 Cal. 499), on the ground that by a then recent statute the proceedings of the probate court within its jurisdiction are construed as are proceedings of courts of general jurisdiction.

<sup>39</sup> *Gray v. Cruise*, 36 Ala. 561.

<sup>40</sup> *Irwin v. Scriber*, 18 Cal. 499; *Brodribb v. Tibbits*, 63 Cal. 80.

<sup>41</sup> *Dickinson v. Hayes*, 31 Conn. 422.

<sup>42</sup> *Potwine's Appeal*, 31 Conn. 381; *Bulkley v. Andrews*, 39 Conn. 523; *Clarkson v. Beardsley*, 45 Conn. 197; *Clement v. Brainard*, 46 Conn. 184; *Tant v. Wigfall*, 65 Ga. 412; *Ryno's Ex'r v. Ryno's Adm'r*, 27 N. J. Eq. 524; *Obert v. Hammel*, 18 N. J. Law, 79. In Maryland, the orphans' court is called a court of special and limited jurisdiction, so far that it cannot exercise any powers but what are given it by statute. *State v. Warren*, 28 Md. 355; *Grant Coal Co. of Allegany Co. v. Clary*, 59 Md. 445. But as to the conclusiveness of its decree it is held that the appointment of an administrator by an orphans' court of a county other than that in which the intestate resided is conclusive, and cannot be attacked in a collateral proceeding (*Raborg v. Hammond*, 2 Har. & G. 42; *Shultz v. Houck*, 29 Md. 26), and that a decree on a subject within the jurisdiction of the court is conclusive in a collateral action (*Blackburn v. Craufurd*, 22 Md. 466). In Massachusetts the probate court was not originally one of record (*Chase v. Hathaway*, 14 Mass. 226), and in one of the earlier cases it was said to be a court of inferior jurisdiction, in such a sense that, even when it has jurisdiction over the general subject, if it exceeds its powers and acts in a manner prohibited by law, its decrees are not merely irregular or voidable, but void and of no effect, and may be set aside in a collateral proceeding by plea and proof (*Peters v. Peters*, 8 Cush. 543, per Shaw, J.). So in early cases it was held that where, by statute, the probate court was given authority to award the whole real estate to one heir, upon his giving security to pay the other heirs a money equivalent for their share, and the court made such award but failed to take security, or otherwise did not follow the directions of the statute, the award was void (*Newhall v. Sadler*, 16 Mass. 122;

in a recent case the following rule as to the conclusiveness of the decrees of the court was stated: that where the jurisdiction depends on some collateral fact which can be decided without going into the case on its merits, then the jurisdiction may be questioned collaterally, and disproved, even though the jurisdictional fact be averred

Jenks v. Howland, 3 Gray, 536; Hunt v. Hapgood, 4 Mass. 117; Sumner v. Parker, 7 Mass. 79); but the heirs may so act that they will not be allowed to set up this fact in a collateral proceeding, as, for instance, if they have had the money equivalent paid to them and have accepted it (White v. Clapp, 8 Metc. 365). The early rule is qualified later by this remark, that when it is said that if the probate court clearly exceeds its powers, or does an act prohibited by law, even though it has jurisdiction over the subject-matter, its decrees are void. This is only one way of saying that when the jurisdiction of the court over the subject-matter is in any particular limited, then its decree is not binding if it oversteps the limits fixed. Pierce v. Prescott, 128 Mass. 144; Jenks v. Howland, 3 Gray, 536. Thus, where original administration was granted after 20 years from the death of the intestate contrary to the statute, the administration was held void in a collateral suit. Wales v. Willard, 2 Mass. 120. And so, where an illegal notice and citation was served on petition for removal of a guardian, the court was held not to have jurisdiction, and its decree was held to be void. Baker v. Blood, 128 Mass. 545. The probate court is not one of inferior jurisdiction in such a sense that certiorari or writ of error will lie to amend its decrees. Peters v. Peters, 8 Cush. 543; Smith v. Rice, 11 Mass. 512. In Mississippi the decrees of the orphans' court on matters within its jurisdiction are conclusive, although the court is not one of general jurisdiction. Its decrees can only be attacked for fraud or mistake (Griffith's Adm'r v. Vertner, 5 How. 736, 738), and they have the usual presumption in favor of their regularity when they are drawn in question in a collateral proceeding (Lum v. Reed, 53 Miss. 78). In New Hampshire the decrees of the probate court on matters within its jurisdiction are conclusive in the same manner and to the same extent as the judgments of the other courts of record, but its decrees may be impeached by showing lack of jurisdiction or fraud. Tebbetts v. Tilton, 31 N. H. 288; Merrill v. Harris, 26 N. H. 142; Morgan v. Dodge, 44 N. H. 257. In New Jersey the orphans' court is said to be a court of general jurisdiction, with a seal, established term, and records (Ryno's Ex'r v. Ryno's Adm'r, 27 N. J. Eq. 524; Den v. Hammel, 18 N. J. Law, 79); but if it acts beyond its jurisdiction its decrees are void, as, if the supposed deceased were alive, or if letters lawfully granted to some one else were in existence and the court should proceed to grant administration (Quidort's Adm'r v. Pergeaux, 18 N. J. Eq. 477; Ryno's Ex'r v. Ryno's Adm'r, 27 N. J. Eq. 524). In New York county, by statute, orders and decrees of the surrogate cannot be questioned, even for want of jurisdiction, except on appeal or in a proceeding to set aside, open, vacate, or modify

of record, and was actually found upon the evidence, by the court rendering the judgment; but, on the other hand, where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the latter question, then the judgment is collaterally conclusive, because the question of jurisdiction cannot be retried without partly, at least, retrying the case on its merits, which is not permissible in a collateral proceeding.<sup>43</sup> This rule, however, cannot be commended, and is opposed to the weight of authority.

*Jurisdiction as Depending on Residence of the Deceased.*

One of the cases which most frequently raises the question of the conclusiveness of the decrees of probate courts is that in which the decree is attacked in a collateral suit on the ground that the deceased did not reside in the county in which administration was granted, and therefore the act of the court was without its jurisdiction and void, since, as will be seen later,<sup>44</sup> administration must be granted in the county in which the deceased resided if he was a resident of the state. In the earlier cases, in one or two states, there was an inclination to allow this mode of attack in collateral cases,<sup>45</sup> but by statutory enactment in those states the rule has now been changed to accord with the rule supported in other states by the weight of

them (Harrison v. Clark, 87 N. Y. 576; Kelly v. West, 80 N. Y. 144); and both in this county and elsewhere it is held that the surrogate's decrees are conclusive when the subject-matter and parties are within his jurisdiction (Harrison v. Clark, 87 N. Y. 576; Martin v. Railroad Co., 92 N. Y. 74). In Harrison v. Clark the surrogate granted administration, with a limitation giving the administrator power to prosecute a suit, but not to collect or compromise. This limited administration was declared within the discretion of the court, and his decree not void by reason of such limitation. In Pennsylvania the same general result which has already been indicated is now reached by statute, and the decree of the orphans' court in matters within its jurisdiction is conclusive in a collateral action, unless attacked for fraud or want of jurisdiction apparent on the record. Thus, the probate of a will is conclusive of the execution of the will, in an action of ejectment. Wilson v. Gaston, 92 Pa. St. 207; Leedom v. Lombaert, 80 Pa. St. 381; Lovett's Ex'rs v. Matthews, 24 Pa. St. 330.

<sup>43</sup> People's Sav. Bank v. Wilcox, 3 Atl. 211, 15 R. I. 258.

<sup>44</sup> Post, p. 35.

<sup>45</sup> Cutts v. Haskins, 9 Mass. 543; Holyoke v. Haskins, 5 Pick. (Mass.) 20; Beckett v. Selover, 7 Cal. 215.

authority and better reason, i. e. that the jurisdiction of the probate court, so far as it depends on the place of residence of the deceased, shall not be contested in collateral proceedings,<sup>46</sup> unless it appears on the face of the record that the deceased did not reside in the county in which the decree was made, in which case the decree is void on its face, and may be attacked collaterally.<sup>47</sup>

In Connecticut, however, it is still held that, if the deceased in fact did not reside in the county where administration was granted, the decree is void and may be attacked in a collateral suit.<sup>48</sup>

*Jurisdiction as Depending on Time of Grant.*

A similar question has been raised in a case where administration, granted after the expiration of the time limited by statute for such grant after the death of the decedent, was attacked in a collateral suit, and it was held that the grant in such a case was void because the court had assumed a jurisdiction expressly denied by the statute, and the grant might be shown to be void in collateral proceedings;<sup>49</sup> and another case, decided very recently, holds that an appointment

<sup>46</sup> *McFeely v. Scott*, 128 Mass. 16; *Vinet v. Bres*, 20 South. 693, 48 La. Ann. 1254; *Irwin v. Scriber*, 18 Cal. 499; *In re Griffith*, 23 Pac. 528, 24 Pac. 381, and 84 Cal. 107; *Andrews v. Ivory*, 14 Grat. (Va.) 229; *Coltart v. Allen*, 40 Ala. 155; *Tant v. Wigfall*, 65 Ga. 412; *Raborg's Adm'r v. Hammond's Adm'r*, 2 Har. & G. (Md.) 42; *Schultz v. Houck*, 29 Md. 26; *Eller v. Richardson*, 15 S. W. 650, 89 Tenn. 575; *East Tennessee, V. & G. R. Co. v. Mahoney*, 15 S. W. 652, 89 Tenn. 311; *Kling v. Connell* (Ala.) 17 South. 121. In Alabama it has been decided that, when administration has been granted in one county and is then granted to another person in another county, the first grant is conclusive of the residence of the deceased, as against an attempt of the second appointee to have the first grant revoked by the court which made it; the court saying that the probate court is one of general jurisdiction, and its decrees are conclusive. *Coltart v. Allen*, 40 Ala. 155. It has also been held in the same state that if the probate court appoints an administrator de bonis non while there is an administrator in office its acts are void, and the appointment may be attacked collaterally. *Matthews v. Douthitt*, 27 Ala. 273. In another case a plea to the jurisdiction was held bad; but it was said that the appointment of an administrator might be assailed in a suit by him on the ground that the probate court had no authority to make the grant. *Miller v. Jones*, 26 Ala. 247.

<sup>47</sup> *Moore v. Philbrick*, 32 Me. 103; *Moore's Estate v. Moore*, 50 N. W. 443, 33 Neb. 509. And see cases cited in note 46.

<sup>48</sup> *First Nat. Bank v. Balcom*, 35 Conn. 351.

<sup>49</sup> *Wales v. Willard*, 2 Mass. 120.

of an administrator after the time limited for such appointment has elapsed is absolutely void.<sup>50</sup> In neither case was the jurisdictional fact alleged in the record, and the finding of its nonexistence did not contradict the record.

*Jurisdiction as Depending on Property.*

It will be seen in the next chapter that the existence of property of the deceased to be administered is generally necessary to support the jurisdiction of the probate court in granting administration, and the question has been raised in several cases whether the nonexistence of this jurisdictional fact may be shown in collateral proceedings. The rule as settled by the decisions is that the general jurisdiction of the probate court covers only cases where property is involved, and therefore if it acts in a case where there is no property its act is without jurisdiction, and may be shown to be void in collateral proceedings if such proof does not contradict the findings of the probate court; and the question of whether or not there was property may in such case be tried in such collateral proceedings, and the grant sustained if property is found to exist.<sup>51</sup> The cases are not, however, unanimous on this point. In a case where the action was brought by an administrator upon promissory notes signed by the defendants, and payable to the order of the deceased and overdue, the decree of the probate court appointing the administrator contained the recital, "it appearing that the said deceased left estate in said county of Hampden to be administered." Evidence was offered to show that there was no property in the county. Mr. Justice Gray, in delivering the opinion of the court, says, "If the facts necessary to give jurisdiction did not exist, the grant of administration is wholly void," and proceeds to examine the question of whether there was property or not, deciding, however, that the residence of a debtor of the intestate gave jurisdiction.<sup>52</sup> And in another case the question

<sup>50</sup> Rice v. Henly, 15 S. W. 748, 90 Tenn. 69.

<sup>51</sup> Hartford & N. H. R. Co. v. Andrews, 36 Conn. 214; Hutchins v. Railroad Co., 46 N. W. 79, 44 Minn. 5; Pinney v. McGregory, 102 Mass. 189; Brown's Adm'r v. Railroad Co. (Ky.) 30 S. W. 639; Christy v. Vest, 36 Iowa, 287; Lees v. Wetmore, 12 N. W. 238, 53 Iowa, 170; Miller v. Jones, 26 Ala. 247; Bradley v. Broughton, 34 Ala. 707; Jeffersonville R. Co. v. Swayne's Adm'r, 26 Ind. 477. And see post, 39.

<sup>52</sup> Pinney v. McGregory, 102 Mass. 189. See, also, Harrington v. Brown, 5 Pick. (Mass.) 519; Emery v. Hildreth, 2 Gray (Mass.) 228.

was gone fully into whether a claim given by statute against a railroad company for the negligent killing of the intestate was property in such a sense as to give the probate court jurisdiction to grant administration upon the estate of a nonresident. The question was raised in an action brought by the administrators against the railroad company, and the supreme court, after investigation, decided to maintain the jurisdiction of the probate court.<sup>53</sup> In a case in Iowa<sup>54</sup> the title of the administrator of a nonresident was successfully disputed in a collateral proceeding upon the ground that the deceased left no property in the county where the letters were granted; and in a later case the court examined the question as to whether there was property in the county, deciding that there was, and upholding the appointment of an administrator, but at the same time saying that the decision of the probate court was conclusive, and could not be collaterally assailed.<sup>55</sup> In a case in Alabama<sup>56</sup> the court, in an action of detinue by an administrator, held that it was not concluded by the allegations as to property in the application for letters of administration, but could look to the facts, and that, in fact, property was in the county at the time of the granting of letters, and it therefore sustained the letters. And in another case<sup>57</sup> it is said of a similar appointment that if there had been at the time of the appointment no assets belonging to the estate, in the county, the appointment would have been absolutely void, and would have been so declared when collaterally assailed; but this was an obiter dictum. In a case in Indiana, where suit was brought by an administrator of a nonresident against a railroad company for causing the death of the deceased by its negligence, the company petitioned the probate court to revoke the letters on the ground that there were no assets in the county. It was admitted that there were no assets unless it were the cause of action against the railroad company, and the court said that if there were no assets the grant was void, and,

<sup>53</sup> *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 214. See, also, *post*, c. 3, p. 46; *Id.* c. 22, p. 451.

<sup>54</sup> *Christy v. Vest*, 36 Iowa, 287.

<sup>55</sup> *Lees v. Wetmore*, 12 N. W. 238, 53 Iowa, 170. See, also, *Murphy v. Creighton*, 45 Iowa, 179.

<sup>56</sup> *Miller v. Jones*, 26 Ala. 247.

<sup>57</sup> *Bradley v. Broughton*, 34 Ala. 707.

further, that the claim against the railroad was not assets, as it was given by statute for the benefit of the widow and next of kin, and the grant was therefore void.<sup>58</sup>

The general tendency, therefore, is to consider the existence of property of the deceased in the county at the time letters are granted to be essential to the jurisdiction of the court, and if in a collateral proceeding it is clearly shown that there was no property the decree is void, but if the evidence is doubtful the decree will be sustained;<sup>59</sup> but that if the decree recites that the deceased died leaving assets in the county the recital is binding in a collateral proceeding,<sup>60</sup> and the decree cannot be attacked as erroneous because of any insufficiency of evidence of the fact before the probate court, for the weight of this evidence and the correction of the finding will not be revised in a collateral suit.<sup>61</sup>

### *Jurisdiction in Sales of Land.*

In many states, by statute, probate courts are given a special jurisdiction allowing them to order sales of land of the deceased when it is necessary for the payment of his debts. This special statutory authority stands on a different footing from the ordinary general jurisdiction of the probate courts, and it is held not only that all the necessary jurisdictional facts to support a decree of sale must exist, but that the decree must show these facts, and may be collaterally attacked on the ground that the averment of some necessary jurisdictional fact was lacking. Thus, it has been held in Alabama that the decree of the probate court ordering the sale of property must be founded upon the requisite jurisdictional facts.<sup>62</sup> So, in California it is held that a decree for the sale of land is made under special statutory authority, and the proceedings must show such facts as will support the jurisdiction.<sup>63</sup> In Pennsylvania it is held that the decree of the orphans' court ordering the sale of land

<sup>58</sup> *Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477.

<sup>59</sup> See cases, *supra*, note 51; *Plume v. Savings Inst.*, 46 N. J. Law, 211; *Beers v. Shannon*, 73 N. Y. 292; *Barclift v. Treece*, 77 Ala. 528.

<sup>60</sup> *Leonard v. Navigation Co.*, 84 N. Y. 48.

<sup>61</sup> *O'Connor v. Huggins*, 21 N. E. 184, 113 N. Y. 516.

<sup>62</sup> *Ikelheimer v. Chapman's Adm'rs*, 32 Ala. 680. For the discussion of this power and its exercise, see post, c. 17.

<sup>63</sup> *Pryor v. Downey*, 50 Cal. 399; *Dennis v. Winter*, 63 Cal. 17.

may be shown to be void in a collateral action if the proceedings do not follow the regulations of the statute,<sup>64</sup> but if the proper jurisdictional facts are shown in the proceedings the decree is conclusive, and cannot be attacked collaterally.<sup>65</sup> In Georgia, however, it is held that the decree ordering the sale of land is a part of the general jurisdiction of the court, and cannot be attacked collaterally.<sup>66</sup>

*Plume v. Howard Savings Institution.*

A satisfactory statement of the character and jurisdiction of the probate courts may be found in the case of *Plume v. Howard Savings Institution*.<sup>67</sup> In this case the plaintiff was administrator of one who had deposited money in the defendant institution, and sued as administrator to recover the balance. The defense was that the orphans' court had no jurisdiction to appoint an administrator, since there was no proof either of the death or last residence of the supposed intestate. The orphans' court had granted the letters on the theory that the depositor had died resident in another state and leaving assets in the county. The only proof of these facts was that the depositor, a Roman Catholic priest, had removed from the state about 30 years previous to the filing of this petition for letters of administration, and had been stationed by the orders of his church in Ohio and Nebraska, and had been last heard of about 20 years previous to the filing of the petition, and was alleged by the vicar general of the diocese of Kansas to have died about 12 years previous to the same date, in Nebraska. There was some other slight evidence that the intestate was dead, and these facts were all verified by the affidavit of the person applying for the grant of letters. Mr. Chief Justice Beasley said: "Looking at the foregoing statement of facts, it is manifest that the orphans' court on the occasion in question had jurisdiction of the subject involved in the application for authority to administer the estate of [the depositor] as that of a deceased intestate. Such matter was as actually before that tribunal

<sup>64</sup> *Messinger v. Kintner*, 4 Bin. 103; *Fogelsonger v. Somerville*, 6 Serg. & R. 267; *Stoolfoos v. Jenkins*, 8 Serg. & R. 173.

<sup>65</sup> *M'Pherson v. Cunliff*, 11 Serg. & R. 422; *Painter v. Henderson*, 7 Pa. St. 51; *Torrance v. Torrance*, 53 Pa. St. 505.

<sup>66</sup> *Tucker v. Harris*, 13 Ga. 7; *Wood v. Crawford*, 18 Ga. 526.

<sup>67</sup> 46 N. J. Law, 211. See, also, *Schluter v. Bank*, 22 N. E. 572, 117 N. Y. 125; *Mechem*, Cas. Succ. p. 134.



for its adjudication as it was possible for it to be. We might, perhaps, doubt whether the court deduced the correct conclusion from the testimony before it as to the fact of the death of the alleged decedent, or as to its right to grant administration, under the conditions of the case, to the plaintiff, but it seems illogical to deny the power of the court to take cognizance of the affair and to proceed to judgment. In the case of *Grove v. Van Duyn*<sup>68</sup> the test of jurisdiction, so far as it relates to courts having a general cognizance over a class of cases, was declared by the court of errors to be the colorable presentation before it of the facts necessary to constitute the case a member of such class. In the present case there was plainly some proof of the death of the supposed intestate, and likewise of the fact that he was not at the time of his decease a resident of this state, and therefore, even if the court fell into error, which I do not intend to indicate, such error might have led, in a proper course of law, to a reversal of its judgment, but it can have no bearing against the rights of the court to adjudicate upon the facts before it. Upon this assumption, that this power of jurisdiction existed, it is apparent that the defendant in this instance must stand on the proposition that he has a right to show that the orphans' court decided incorrectly with respect to the evidence relating to jurisdictional facts. But such a contention is opposed to the fundamental rules of law. If its correctness were admitted, it would at once degrade the judgments of the higher courts of the state to the subordinate ranks of official procedures of a special character by statutory authority. For example, on such a theory, a judgment of this court might be overthrown when put to the touch in a collateral proceeding, upon the ground that the court erred in deciding on the facts before it that the defendant in the suit had been summoned, when in point of fact he had not received any notice of the action. Notice of a suit to a defendant in an action is as indispensable to the power of the court to take cognizance of the case as is the fact of the decease of an alleged intestate to the jurisdictional authority of the orphans' courts to act in the matter of administration, and no reason can be urged why, if one of such subjects is open to incidental attack, the other should not be equally so. In such a

<sup>68</sup> 44 N. J. Law, 654.

particular the highest court of the state cannot be discriminated from the orphans' court, for it is entirely settled by repeated judgments that this latter tribunal is a superior court of general jurisdiction, and that its proceedings and judgments are in no respect more contestable than those of common-law courts of the highest order. \* \* \* And in view of these principles it appears to me incontestable that the defense in this case cannot prevail. Courts of general jurisdiction need not set forth in their records the facts upon which their right to adjudicate depends, but such facts will be presumed, and no evidence can be received to contradict them, as such intendments are *præsumptiones juris et de jure*. It is, indeed, this quality which constitutes the principal distinction between courts of superior and general jurisdiction and those of limited and special jurisdiction. The doctrine is unquestionable, and is too rudimentary to justify discussion. Consequently, when the orphans' court of the county of Essex, having this matter by the requisite proceedings before it, awarded letters of administration in the present case, it will be intended, by force of the rule of law just stated, that it decided all the facts requisite to validate its action. If it had not been deemed to be satisfactorily shown that the alleged intestate was dead, and that he was not resident at the time of death in this state, and that the plaintiff, although not the original petitioner, could legally be appointed the administrator, the decree which was made could not have been made lawfully, and the consequence is that it must be held in this incidental proceeding that such matters were passed upon by the court. To such a procedure the maxim '*Omnia præsumuntur rite esse acta*' is applicable."

#### SAME—ADMINISTRATION ON ESTATE OF PERSON STILL ALIVE.

11. If, by mistake, administration is granted upon the estate of a person who is still alive, the decree of the court is without jurisdiction and void, and may be attacked on this ground in collateral proceedings.

The rule above stated has been followed where it appeared in suits by or against the executor or administrator that the supposed deceased person was alive. If the proof of this fact is clear and incon-

testable, the courts in a collateral suit allow the question to be tried, and a judgment given in accordance with the fact.<sup>69</sup> The only two cases opposed to these decisions are *Roderigas v. East River Sav. Inst.*<sup>70</sup> and *Scott v. McNeal*,<sup>71</sup> afterwards reversed by the United States supreme court.<sup>72</sup> In the former case it was held that, under the statutes of New York requiring the surrogate to investigate the question of the death of the supposed deceased, his decision upon this fact was final, so as to give him jurisdiction to grant letters of administration, and that these letters could not be attacked in a collateral proceeding. The facts in this case were almost precisely the same as those in *Jochumsen v. Suffolk Sav. Bank*,<sup>73</sup> and the two decisions are directly opposed; but the weight of authority is with the Massachusetts case. And in another case in New York, between the same parties, the court, on evidence that the surrogate had never in fact investigated the question of the death of the supposed decedent, or had any evidence thereof,<sup>74</sup> reversed the decision. All of the above were cases where the actual existence of the person who had been supposed deceased was admitted on all hands, and his identity with the party to the suit. But the same rule would

<sup>69</sup> *Jochumsen v. Bank*, 3 Allen (Mass.) 87; *Scott v. McNeal*, 14 Sup. Ct. 1108, 154 U. S. 34, reversing 31 Pac. 873, 5 Wash. 309; *Devlin v. Com.*, 101 Pa. St. 273; *Perry v. Railroad Co.*, 29 Kan. 420, 423; *Stevenson v. Superior Court*, 62 Cal. 60; *Burns v. Van Loan*, 29 La. Ann. 560; *French v. Frazier's Adm'r*, 7 J. J. Marsh (Ky.) 425, 427; *Duncan v. Stewart*, 25 Ala. 403; *Johnson v. Beazley*, 65 Mo. 260, 264; *Andrews v. Avory*, 14 Grat. (Va.) 229, 236; *Morgan v. Dodge*, 44 N. H. 255, 259; *Thomas v. People*, 107 Ill. 523; *Griffith v. Frazier*, 8 Cranch, 23; *Moore v. Smith*, 11 Rich. (S. C.) 569; *Lavin v. Bank*, 1 Fed. 641, 18 Blatchf. 24; *Melia v. Simmons*, 45 Wis. 334; *State v. White*, 29 N. C. 116; *Withers v. Patterson*, 27 Tex. 491, 497; *D'Arusment v. Jones*, 4 Lea (Tenn.) 251. See *Mechem, Cas. Succ.* p. 125 et seq. In Maine, by statute, a person sentenced to death or imprisonment for life is supposed to be dead, and his estate is to be administered after his imprisonment (Rev. St. c. 64, § 18); but the fact that a person is sentenced to imprisonment for life does not make him civilly dead, or allow administration upon his estate, except by express statutory provision. In *re Zeph*, 50 Hun, 523, 3 N. Y. Supp. 460.

<sup>70</sup> 63 N. Y. 460.

<sup>71</sup> 31 Pac. 873, 5 Wash. 309.

<sup>72</sup> 14 Sup. Ct. 1108, 154 U. S. 34.

<sup>73</sup> 3 Allen (Mass.) 87.

<sup>74</sup> *Roderigas v. Savings Inst.*, 76 N. Y. 316.

hold good if there was only a doubtful case, and in a collateral proceeding the court would try the fact of death. The fact of letters being granted raises a strong presumption of the fact of death, and if no evidence is offered to rebut this, except proof that the probate court acted upon slight evidence of death from long absence, the court in the collateral proceeding will not decide that the letters are void. Thus, in a recent case in New Jersey, where the death of the supposed intestate was presumed by the probate court from a lapse of more than seven years without news from him, and on slight corroborative evidence, in a suit by the administrator the decision of the probate court was attacked, and the supreme court held that there was some evidence of death, and that it would not decide whether the decision was erroneous or not, since there was evidence on which it might be supported.<sup>75</sup> This case led to the enactment of a statute in that state relating to the administration of the estates of persons presumed to be dead.<sup>76</sup>

#### **SAME—PRESUMPTION OF REGULARITY.**

- 12. Probate courts being courts of general jurisdiction, all their proceedings are presumed to be done regularly, and no mere irregularity or defect in the proceedings can be taken advantage of in collateral proceedings.**

The proceedings of courts of general jurisdiction are presumed in collateral suits to have been carried on regularly and in due course of law, and they cannot be attacked in collateral proceedings on the ground of irregularity, since such attacks should be made in the proceedings where the irregularity which is complained of occurred, and this principle is extended to probate courts by virtue of the decisions which hold them to be courts of general jurisdiction. The same presumptions, therefore, are made in favor of these courts as in case of other superior courts, and, as above stated, no mere irregularity or defect in the proceedings can be availed of in collateral

<sup>75</sup> *Plume v. Savings Inst.*, 46 N. J. Law, 211.

<sup>76</sup> Supp. Revision, 1877-1886, p. 776, tit. "Orphans' Courts."

suits.<sup>77</sup> Thus, when a probate court has approved and probated a will, a court of equity cannot annul or set aside the decree on the ground that the will is a forgery.<sup>78</sup> So, when the probate court appoints a public administrator, this appointment is conclusive, in a collateral proceeding, of the fact that there were no relatives or creditors in the state competent and willing to accept the trust.<sup>79</sup>

So, where one sued an administrator for services rendered during the last sickness of the intestate, and the defendant pleaded *plene administravit*, it was held that it was not competent for the plaintiff to impeach the account of the defendant, which had been allowed by the probate court, since the decree of that court having jurisdiction of the subject-matter was conclusive.<sup>80</sup>

So, where one was appointed administrator of the estate of a non-resident, on the ground that there was a judgment debt in favor of the intestate against an inhabitant of the county in which application was made, it was held that in an action on that judgment debt it was not possible for the defendant to give evidence impeaching the regularity of the plaintiff's appointment as administrator, since the probate court had jurisdiction of the case, there being assets in the county where the appointment was made, and the decree of the probate court being therefore conclusive.<sup>81</sup> So, where a decree of distribution was passed by a probate court, ordering the payment of a share of the estate to A. as administrator of B., it was held that this was an adjudication that A. was legally appointed administrator of B., and that, the decree having been neglected by the administrator, who was commanded to pay over the share, his bond might be sued on for the benefit of the other administrator, and

<sup>77</sup> *Templeton v. Ferguson* (Tex. Sup.) 33 S. W. 329; *Plume v. Savings Inst.*, 46 N. J. Law, 211. And see cases collected *supra*, note 42, on the question of the conclusiveness of the decrees of the probate court. *Pierce v. Prescott*, 128 Mass. 140; *Emery v. Hildreth*, 2 Gray (Mass.) 228; *Thompson v. Thompson*, 9 Pa. St. 234; *Peebles' Appeal*, 15 Serg. & R. (Pa.) 39; *Colton v. Ross*, 2 Paige (N. Y.) 396; *Probate Court v. Vanduzer*, 13 Vt. 135; *McFarland v. Stone*, 17 Vt. 165; *Tebbetts v. Tilton*, 24 N. H. 120; *Clark v. Pishon*, 31 Me. 503; *Macey v. Stark*, 21 S. W. 1088, 116 Mo. 481.

<sup>78</sup> *Wolcott v. Wolcott*, 3 N. E. 214, 140 Mass. 194.

<sup>79</sup> *Schnell v. Chicago*, 38 Ill. 382.

<sup>80</sup> *Parcher v. Bussell*, 11 Cush. (Mass.) 107.

<sup>81</sup> *Emery v. Hildreth*, 2 Gray (Mass.) 228.

that the validity of the appointment of such other administrator could not be impeached in that suit.<sup>82</sup>

**SAME—DECREES OF PROBATE COURTS IN OTHER STATES.**

13. The conclusiveness of the decrees of a probate court in matters within its jurisdiction is, by virtue of the constitution of the United States, extended to proceedings in other states, and they cannot be impeached except by showing fraud or lack of jurisdiction.

Thus, where a will was probated in Connecticut, and was then offered in a Massachusetts court for the record which is provided by the statute, it was held that the probate in Connecticut was conclusive as to all matters affecting the validity of the will or its probate,—for instance, as to the capacity of the testator, or the fact of undue influence.<sup>83</sup> And so it has been held that, where facts necessary to give the court jurisdiction existed, the decree could not be attacked collaterally in the federal courts.<sup>84</sup>

<sup>82</sup> *White v. Weatherbee*, 126 Mass. 450.

<sup>83</sup> *Crippen v. Dexter*, 13 Gray (Mass.) 331; Const. U. S. art. 4, § 1.

<sup>84</sup> *Simmons v. Saul*, 11 Sup. Ct. 369, 138 U. S. 439.

### CHAPTER III.

#### PLACE AND TIME OF APPOINTMENT AND REQUISITES THEREFOR.

- 14-15. Place of Appointment.
- 16. Property Necessary to Give Jurisdiction.
- 17. Time Limit for Application.

#### PLACE OF APPOINTMENT.

14. An executor or administrator is to be appointed in the county or district
- (a) In which the deceased resided at the time of his death, if a resident of the state.
  - (b) In which he left property, if a nonresident. If there is property in more than one county or district, application may be made in any one, and jurisdiction first acquired is exclusive for that state.
15. The residence which confers jurisdiction is an actual domicile, and is a question of fact. A change of domicile must be proved by an actual change of residence, and an intention to make the change permanent.

The rules stated above as to the locality in which application should be made to the probate court for appointment as executor or administrator are generally enacted by statute in the United States, although they originated in the early practice of the ecclesiastical courts of England in granting letters in the diocese in which the deceased last dwelt.<sup>1</sup> These statutes, although varying somewhat in language, are almost uniformly to the effect that if the deceased

<sup>1</sup> In England, when the jurisdiction over administration was in the ecclesiastical courts, the court in which the testament of a deceased person ought to be proved or his estate administered was the court of the ordinary of the place where the deceased dwelt,—that is, generally speaking, the court of the bishop of the diocese. 1 Williams, Ex'rs, 332; Godol. pt. 1, c. 22, § 2; 2 Inst. 398; Com. Dig. "Administration," bk. 5. But if the deceased at the time of his death had effects to such an amount as to be considered notable goods, usually

was a resident of the state the application for letters must be made in the county in which he resided at the time of his death, while if he was a nonresident of the state the application may be made in any county in which he left property, and the probate court which first gets jurisdiction in the case extends its jurisdiction over the whole state, and thereafter no other probate court in that state can entertain any application for the appointment of an executor or administrator, as long as the first appointment remains unrevoked.<sup>2</sup>

### *Residence.*

The word "residence," when it is used in this context as fixing the county or district in which the application for letters must be made, has the same significance as the word "domicile" usually has in law,

called "bona notabilia," within some other diocese than that in which he died, then the will was to be proved before the archbishop or metropolitan of the province by way of special prerogative, whence the courts where the validity of such wills was tried and the offices where they were registered were called the prerogative courts and the prerogative offices of Canterbury and York. Williams, Ex'rs, 333; 4 Inst. 335. The consequence was that questions of no little difficulty often arose with respect to the inquiry whether the will was to be proved in the diocesan or in the prerogative court. And great inconvenience was also incurred where the deceased died possessed of goods in both the provinces of York and Canterbury.

<sup>2</sup> In re Fallon's Estate, 3 Ohio, N. P. 62; Spencer v. Wolf (Neb.) 67 N. W. 858; Stearns v. Wright, 51 N. H. 611; Beers v. Shannon, 73 N. Y. 292; Henderson's Adm'rs v. Clarke, 4 Litt. (Ky.) 277; Jeffersonville R. Co. v. Swayne's Adm'r, 26 Ind. 477; Ward v. Oates, 43 Ala. 518; Miller v. Jones, 26 Ala. 247; Adams v. Brooks, 35 Ga. 63; Fletcher v. McArthur, 15 C. C. A. 224, 63 Fed. 65; Patillo v. Barksdale, 22 Ga. 356; Lees v. Wetmore, 12 N. W. 238, 58 Iowa, 170; Little v. Sinnett, 7 Iowa, 324; Bowles v. Rouse, 3 Gilman (Ill.) 409; Illinois Cent. R. Co. v. Cragin, 71 Ill. 177; Hartford & N. H. R. Co. v. Andrews, 36 Conn. 214; In re Scott's Estate, 15 Cal. 220; Pinney v. McGregory, 102 Mass. 186; Emery v. Hildreth, 2 Gray (Mass.) 228; Bowdoin v. Holland, 10 Cush. (Mass.) 17; Harrington v. Brown, 5 Pick. (Mass.) 519; Crosby v. Leavitt, 4 Allen (Mass.) 410. In a few states these rules are modified by limiting the application, in the case of nonresidents, to the county where the greater part of the property is situated. In a few states real estate devised by will fixes the jurisdiction, while in others the county of the death is, in case of nonresidence, the county to which jurisdiction is given. The local statutes should be consulted in each instance. People v. White, 11 Ill. 341; Coltart v. Allen, 40 Ala. 155; People's Sav. Bank v. Wilcox, 3 Atl. 211, 15 R. I. 258; Oh Chow v. Brockway, 28 Pac. 384, 21 Or. 440.



and means the place where the deceased actually dwelt and had his home.<sup>3</sup> The same facts as to the place and manner of living, intention to make the place a home, and other relevant facts, go to determine the question of domicile in this case as in other similar cases, and form an issue of fact for the judge to decide. A residence once proved is presumed to continue, and if a contesting party attempts to show that a change of domicile took place, so as to shift the county or district in which application for letters should be made, he must show not only that the deceased actually changed his residence or dwelling, but that he made that change with the intention of changing his home, and making a permanent dwelling place, or, at least, a home for a time, in the place to which he has removed.<sup>4</sup> Thus, when one owned a house and land in a county where she had long resided, but went to another county and stayed there till she died, it was held that if she died without having indicated by decided acts or declarations an intention to acquire another residence, her residence could not be considered changed.<sup>5</sup> The fact that a person who lives in the country most of the year has a town house in which he spends the winter, and does this for a succession of years, is not enough, alone, to transfer his residence from the country to the city, although he may be actually living in his town house at the time of his death; the place of death having no conclusive significance in determining the place of residence.<sup>6</sup> A person non compos may change his residence, and if it is done by the order of his guardian with the intention of making a permanent change, or if the person non compos is in fact himself capable of forming such intention, and does form it, it results in a change of domicile.<sup>7</sup> But where one was partially paralyzed, and had softening of the brain, it was held that she was not in a condition to form an intention to change her residence.<sup>8</sup>

<sup>3</sup> Holyoke v. Haskins, 5 Pick. (Mass.) 20, 26.

<sup>4</sup> First Nat. Bank of New Haven v. Balcom, 35 Conn. 351; President, etc., of Harvard College v. Gore, 5 Pick. (Mass.) 370.

<sup>5</sup> Shultz v. Houck, 29 Md. 27.

<sup>6</sup> President, etc., of Harvard College v. Gore, 5 Pick. (Mass.) 370.

<sup>7</sup> Hill v. Horton, 4 Dem. Sur. (N. Y.) 88; Holyoke v. Haskins, 5 Pick. (Mass.) 20.

<sup>8</sup> Ensor v. Graff, 43 Md. 291.

If one leaves his place of abode with a fixed intention of changing his residence, but has not decided where to live, and stays temporarily in another state, his former residence continues.<sup>9</sup> As was said above, when the statute which regulates the locality of administration uses the word "residence," this means the same as "domicile" at common law, and raises a question of fact.<sup>10</sup>

### *Division of Counties, Domicile.*

If one county is divided into two, and the deceased died before the division, his estate should be settled in the probate court of the original county, unless the statute of division provides otherwise, although the place of his former residence may be in the new county after the division;<sup>11</sup> but if probate is begun in the original county before the division is made, it is competent for the court of that county to send the record to the court of the new county, if the place of former residence is in the new county after the division is made.<sup>12</sup>

### *Residence of Married Woman.*

The domicile or legal residence of a married woman is generally that of her husband, and a married woman who lives separately from her husband, without divorce or legal separation, cannot acquire a residence apart from his, so as to change the jurisdiction.<sup>13</sup> Where a married man and his wife resided in Baltimore, keeping a grocery store and living with his sister, and his wife suffered from paralysis and softening of the brain, and his sister finally refused to keep her any longer, and her husband, after several ineffectual attempts to procure a boarding place for her in the city, took her to the house of a friend in a different county, to whom he paid board, but without making any permanent arrangements, and saying that he only came to stay for a time or to stay for the winter, and he kept his furniture still in his sister's home in the city, and claimed to live there, and went to the city frequently to attend to his business, it was held

<sup>9</sup> First Nat. Bank of New Haven v. Balcom, 35 Conn. 351.

<sup>10</sup> In re Lewis' Estate, 10 Pa. Co. Ct. R. 331.

<sup>11</sup> In re Harlan's Estate, 24 Cal. 182; Bugbee v. Surrogate of Yates Co., 2 Cow. (N. Y.) 471.

<sup>12</sup> McBain v. Wimbish, 27 Ga. 259.

<sup>13</sup> In re Paulding's Will, Tuck. (N. Y.) 47.

that his residence and that of his wife was still in the city, and that, he having died while this state of facts existed, and she having died shortly afterwards, her state of mind prevented her from forming an intention of making any change of domicile.<sup>14</sup>

The residence of the deceased in the county, being, in case of residents in the state, a jurisdictional fact, cannot be disputed in collateral proceedings, unless the probate record shows that the residence was not such as to give jurisdiction.<sup>15</sup>

#### PROPERTY NECESSARY TO GIVE JURISDICTION.

16. As to what property gives jurisdiction to probate courts the following are the principal rules:

- (a) **Prima facie evidence of the existence of property is sufficient.**
- (b) **Questions of title will not be settled on the application for appointment as executor or administrator.**
- (c) **No special amount of property is necessary, save in a few states by statute.**
- (d) **Statutory power to sell real estate of the deceased is property sufficient to give jurisdiction where the land lies.**
- (e) **Bonds and other specialties are property where they are located.**
- (f) **Judgments are property where recorded.**
- (g) **Other debts, including simple contracts, are property where the debtor resides.**
- (h) **A cause of action for a wrongful act causing death is property where the killing occurred.**

Personal property left by the deceased is the foundation of the appointment of executors and administrators, since the object of the appointment is to use this property in paying debts, and then to distribute what remains among those who are entitled to it, whether by will or by law. The necessity of the existence of property left by the deceased and requiring administration is assumed in all cases

<sup>14</sup> Ensor v. Graff, 43 Md. 292.

<sup>15</sup> See ante, p. 23, c. 2.

by the form of the proceedings and by the action of the probate courts, and it is well recognized in case of estates of nonresidents, and is equally true in case of residents, that if no property is left by the deceased there is no jurisdiction for any administration.<sup>16</sup>

Prima facie evidence, only, of the existence of property of the deceased is necessary to procure appointment as executor or administrator. If the application be resisted, and proof be offered to show that the deceased left no property, such proof cannot avail to prevent the appointment, unless it be clear and explicit and above all doubt. If it raises questions as to the title to property, the appointment will be made; for questions of the title to personal property cannot be decided in the probate court, upon an application for letters. Neither the organization of the court nor its mode of proceeding enables it to decide such questions satisfactorily.

In all cases where the jurisdiction of the court depends upon the fact of property of the deceased in the county it is not necessary to make out an absolute title of the deceased to the property in question. The title may be contraverted, and it may be necessary to resort to courts of common law later to assert the title, but this will not prevent the granting of letters of administration. It is only necessary to satisfy the mind of the probate judge that a bona fide and reasonable claim is made to the property. If the claim is such that the probate judge must say that it is unfounded, he will not grant administration, but otherwise he will grant the administration, and leave the parties to settle their rights in the courts of law.<sup>17</sup> And it has been already seen that the decisions of the probate court on this point are treated with great liberality when they are examined in other courts collaterally, and if there is any ground for upholding the decision of the probate court it will be upheld, the

<sup>16</sup> In *re Pina's Estate* (Cal.) 44 Pac. 332; *Summerlin v. Rabb* (Tex. Civ. App.) 31 S. W. 711; *Mallory's Estate v. Railroad Co.*, 36 Pac. 1059, 53 Kan. 557; *Toledo, St. L. & K. C. R. Co. v. Reeves*, 35 N. E. 199, 8 Ind. App. 667. But, contra, In *re Brooks' Estate* (Mich.) 67 N. W. 975, where the court held that the allegation of property, in case of a decedent resident in the state, was not traversable.

<sup>17</sup> In *re Pina's Estate* (Cal.) 44 Pac. 332; *Grimes v. Talbert*, 14 Md. 169; *Parsons v. Spaulding*, 130 Mass. 83; *Bowdoin v. Holland*, 10 Cush. (Mass.) 17; *Sullivan v. Fosdick*, 10 Hun (N. Y.) 173.

only proper ground of declaring it void being the absolute inability of the court in which the decision is questioned to find any evidence in the case to support the decision of the probate court.<sup>18</sup>

The petition for administration need not formally allege the details of the property, if it states that the deceased left property to be administered.<sup>19</sup>

*Amount of Property Necessary.*

No special amount of property is necessary, unless made so by statutes. If any property belonged to the deceased, it will confer jurisdiction, even though it may be of small value.<sup>20</sup> Thus, for instance, in one case small articles of furniture or of plate were held to be sufficient to confer jurisdiction.<sup>21</sup> In another case the question was discussed whether an old leather trunk was property which would give jurisdiction, but the jurisdiction was sustained upon a debt due the estate by a resident of the county.<sup>22</sup> Neither is it necessary that the property thus forming the basis of jurisdiction

<sup>18</sup> See ante, p. 25, c. 2.

<sup>19</sup> Danby v. Dawes, 16 Atl. 255, 81 Me. 30; Spencer v. Wolf (Neb.) 67 N. W. 858.

<sup>20</sup> Bl. Comm. 494; Palmer v. Allicock, 3 Mod. 59. In England the amount of property affects the jurisdiction of the court. The jurisdiction was prima facie in the bishop's court of the diocese in which the deceased dwelt, as we have already seen. Supra, note 1. But if the deceased at the time of his death had effects of such an amount as to be called "bona notabilia," or notable goods, in some other diocese, then the jurisdiction shifted to the archbishop's court, as he had jurisdiction over both dioceses and could settle the estate in both places. 4 Inst. 335. The amount in value of the property which constituted bona notabilia was £5, as fixed by the canons of the church (93d Canon of 1603); and this value was adopted by the ecclesiastical courts in England (More v. More, 2 Atk. 158; Middleton v. Crofts, Id. 653). It is to be noticed, however, that this limit of value affected only the jurisdiction as to administration, and did not affect the right to administration. In the present act of probate (21 & 22 Vict. c. 95, § 10) a somewhat similar distinction is made. It is there provided that if the personal estate of the deceased is less than £200 in value, and he was not seised or beneficially entitled to real estate of £300 in value, or upwards, the judge of the county court of the place where the deceased had a fixed place of abode shall have the contentious business of the estate, whereas all estates over those amounts are settled in the principal probate office.

<sup>21</sup> Harrington v. Brown, 5 Pick. 519.

<sup>22</sup> Pinney v. McGregory, 102 Mass. 186.

should have been in the county at the time of the decease of the intestate, but it should be at the time of the probate proceedings.<sup>23</sup>

There are a few instances of statutory provision that original administration shall not be granted unless the estate of the deceased is of a certain value. Thus, in Maine it is provided that original administration shall not be granted unless it appears to the satisfaction of the court that there is personal estate amounting to \$20, or debts to that amount and real estate enough to pay them.<sup>24</sup> In other states the statutes merely provide that administration shall be granted when a person dies leaving goods, chattels, or personal estate in the state.<sup>25</sup> It is sufficient in most cases to give slight evidence that there is property of the deceased requiring administration, for this fact is rarely disputed. In case there is a contest, however, the applicant for appointment as executor or administrator will be entitled to his letters unless his opponent shows without any question that there is no property for administration. If the opponent only shows that the title to the property is doubtful, he will not succeed in his opposition, for the probate court will proceed with the appointment, and leave the parties to settle the title to the property in the common-law courts, where such questions are usually tried.<sup>26</sup> If, however, an application for letters is resisted, and con-

<sup>23</sup> *Pinney v. McGregory*, *supra*; *Christy v. Vest*, 36 Iowa, 287; *Robinson v. Robinson*, 11 Ala. 947; *Stearns v. Wright*, 51 N. H. 611; *Johnston v. Smith*, 25 Hun (N. Y.) 171. Some variance of authorities is found in regard to the conclusiveness in a collateral proceeding of the judgment of the probate court upon the question of property. See *ante*, p. 25, c. 2.

<sup>24</sup> *Bean v. Bumpus*, 22 Me. 549; *Shaw, Appellant*, 16 Atl. 662, 81 Me. 207.

<sup>25</sup> In a case arising in a state where no definite amount of property is required by statute, it has been said that if the intestate is a resident of the county the nonexistence of assets in the state would not make the administration void. In this case, however, the question came up collaterally in a suit by the administrator, the defendant pleading this fact in defense, and being overruled. *Watson v. Collins' Adm'r*, 37 Ala. 590. To same effect is a dictum in *Weir v. Monahan*, 7 South. 291, 67 Miss. 434. See, also, *Langsdale v. Woollen*, 21 N. E. 541, 120 Ind. 78. In cases of administration de bonis non in Massachusetts there must, by statute, either be estate valued at \$20 or debts due from the estate to that amount. If the latter exist, the former becomes immaterial (*Bancroft v. Andrews*, 6 Cush. [Mass.] 494; *Dexter v. Brown*, 3 Mass. 32), but a legacy is not a debt in such a case (*Chapin v. Hastings*, 2 Pick. [Mass.] 361).

<sup>26</sup> *Grimes v. Talbert*, 14 Md. 172.

clusive proof is offered that there is no estate on which the grant can operate in the state, administration will be refused. Thus, in a case in New York where application was made for administration of the estate of a person who died over 100 years before, and there was no proof of the existence of personal property, it was said by the court that if it appears that there are no assets, or if the presumption from the lapse of time is that there are none, and no other reason is shown for granting administration, it may be refused.<sup>27</sup> So, in a case in California it was held that an administrator would not be appointed merely to enter an appearance in a suit to quiet title, there being no property to be administered.<sup>28</sup> And in another case it was held that if there is no property and no debts there will be no administration.<sup>29</sup> But if there is conflicting evidence, the decision of the judge of probate upon this question is not necessarily guided by the weight of the evidence, and if there is a possibility that there may be estate upon which the letters of administration will operate he will grant administration.<sup>30</sup> So, it has been held that a bequest in favor of the deceased, in the will of another deceased person, is property, although the title is not clear to the bequest, nor the validity of the bequest.<sup>31</sup>

*Power to Sell Realty, etc.*

A statutory power given to the executor or administrator to sell the real estate of the deceased in order to pay his debts is held to be property sufficient to give the probate court of the county where the land lies jurisdiction to grant letters.<sup>32</sup> Even if the deceased had conveyed his real estate to others, yet, if this was fraudulently done as to his creditors, a probate court may regard the conveyance as a nullity, and grant letters of administration. Nor need the proof of

<sup>27</sup> Van Giessen v. Bridgford, 83 N. Y. 355.

<sup>28</sup> In re Murray's Estate, Myr. Prob. 208.

<sup>29</sup> Summerlin v. Rabb (Tex. Civ. App.) 31 S. W. 710.

<sup>30</sup> Grimes v. Talbert, 14 Md. 172.

<sup>31</sup> In re McCarty, 45 N. W. 996, 81 Mich. 460.

<sup>32</sup> Prescott v. Durfee, 131 Mass. 477; Bowdoin v. Holland, 10 Cush. (Mass.) 17; Bowles v. Rouse, 8 Ill. 409; Sprayberry v. Culberson, 32 Ga. 299; Rutherford's Heirs v. Clark's Heirs, 4 Bush. (Ky.) 27; Temples v. Cain, 60 Miss. 478; Bishop v. Lalouette, 67 Ala. 197; Nicrosi v. Giuly, 5 South. 156, 85 Ala. 365; Little v. Sinnett, 7 Iowa, 324; Lees v. Wetmore, 12 N. W. 238, 58 Iowa, 170; Moore's Estate v. Moore, 50 N. W. 443, 33 Neb. 509.

fraud be such as would be required at law, when the title to the land is in question. In the probate court the question is not the ownership of the land, but whether letters of administration should be granted, and the only proof necessary is to satisfy the judge that there is reasonable ground for the averment that the real estate has been fraudulently conveyed.<sup>33</sup> But real estate which is held subject to a trust, and in which the owner has only a naked legal title, and no beneficial interest, is not assets.<sup>34</sup> Real estate which the deceased bought with another's money, and which has been held adversely by that other long enough to acquire title by adverse possession, will not support the jurisdiction.<sup>35</sup>

A mortgage is not property of a deceased mortgagee after the debt is paid, for if the payment was made at maturity it extinguished the legal title, and if later, so as to leave a legal estate in the mortgagee, still that estate would descend to his heirs in trust for the mortgagor, and not subject to be sold for the mortgagee's debts.<sup>36</sup> An accountable receipt given to the sheriff by one to whom the sheriff has surrendered attached property is not property of the person who owned the goods.<sup>37</sup>

### *Location of Property.*

In cases of the estates of persons who resided in the state at the time of their death, the location of their property in any county is immaterial, for the jurisdiction of the court is established by the facts of residence and property in the state.<sup>38</sup> In the case of estates of nonresidents, however, the location of the property in the county in which application is made for letters is material, since the jurisdiction of the court depends, as has been seen, upon the location of property of the deceased in the county.<sup>39</sup> In most cases the location of chattels of the deceased is a fact easily ascertainable upon testimony. Thus, for instance, the location of the furniture, clothing, carriages, horses, and other chattels of a deceased person are fixed

<sup>33</sup> Bowdoin v. Holland, 10 Cush. (Mass.) 17.

<sup>34</sup> Shaw, Appellant, 16 Atl. 662, 81 Me. 207. Cf. post, p. 226, c. 14.

<sup>35</sup> Ripley v. Bates, 110 Mass. 161.

<sup>36</sup> Crosby v. Leavitt, 4 Allen (Mass.) 410. Cf. post, p. 212, c. 14.

<sup>37</sup> Id.

<sup>38</sup> See ante, p. 23.

<sup>39</sup> See ante, p. 25.



by the testimony of persons who are cognizant of the location. There are, however, several kinds of property which, by their nature, raise questions as to where they shall be considered as located. These are, generally speaking, choses in action; and of these the courts say that a simple contract debt due to the intestate is property in the county where the debtor resides, bond and other specialty debts are property in the county in which the bond or other obligation is, and judgment debts are property in the county in which the judgment is recorded.

A simple contract debt is property in the county where the debtor resides,<sup>40</sup> although he may have removed into that county, and even into the state, since the decease of the intestate.<sup>41</sup> If the debtor is a corporation, incorporated in the state, its residence for this purpose is the county in which it has its principal place of business.<sup>42</sup> A bond, note, or other form of specialty is assets in the county in which it is found.<sup>43</sup> But if suit has been brought on the bond before the death of the obligee, the suit is property in the county where it is brought.<sup>44</sup> Shares of railroad stock have been held to be property, as far as concerns jurisdiction, in the county where the stock books are kept, transfers made, and dividends paid.<sup>45</sup> An interest in a partnership is not such property as will support administration.<sup>46</sup> Any right of action belonging to the estate of the deceased, and not arising from a specialty or judgment, is property in the county where the defendant resides. Thus, a right of action against a life in-

<sup>40</sup> *France v. Aubrey*, 2 Cas. t. Lee, 534; *Byron v. Byron*, Cro. Eliz. 472; *Fernandes' Ex'rs' Case*, 5 Ch. App. 314; *Swinb. Wills*, pt. 6, § 11, fol. 439; *New England Mut. Life Ins. Co. v. Woodworth*, 4 Sup. Ct. 364, 111 U. S. 133-145; *Walker v. Welker*, 55 Ill. App. 118; *Vaughn v. Barret*, 5 Vt. 333, 337; *Merrill v. Insurance Co.*, 103 Mass. 247, 248; *In re Picquet*, 5 Pick. (Mass.) 64, 65; *Emery v. Hildreth*, 2 Gray (Mass.) 228; *Stearns v. Wright*, 51 N. H. 611; *Little v. Sinnett*, 7 Iowa, 324; *Kohler v. Knapp*, 1 Bradf. Sur. (N. Y.) 241; *Beers v. Shannon*, 73 N. Y. 292; *Arnold v. Arnold*, 62 Ga. 627.

<sup>41</sup> *Pinney v. McGregory*, 102 Mass. 186.

<sup>42</sup> *Merrill v. Insurance Co.* 103 Mass. 245.

<sup>43</sup> *Beers v. Shannon*, 73 N. Y. 292; *Johnston v. Smith*, 25 Hun (N. Y.) 171; *Goodlett v. Anderson*, 7 Lea (Tenn.) 286, 289; *Shakespeare v. Safe-Deposit Co.*, 97 Pa. St. 173, 177.

<sup>44</sup> *Barchliff v. Treece*, 77 Ala. 523.

<sup>45</sup> *Arnold v. Arnold*, 62 Ga. 627.

<sup>46</sup> *Shaw, Appellant*, 16 Atl. 662, 81 Me. 207.

surance company, on a policy payable to the deceased, is property sufficient to give jurisdiction in the state in which the company is incorporated, and in the county in which it has its principal place of business.<sup>47</sup>

*Same—Wrongful Act Causing Death.*

A right of action for causing the death of the deceased by negligence is property such as will authorize the grant of letters of administration so as to enable the administrator to sue on the claim, if it is capable of enforcement in the state, as where the killing occurred in the state where the application for appointment is made, and the statute giving the right of action is a statute of that state.<sup>48</sup> Even if there is no other property of the estate, the statutory right, given to an administrator, to sue on a cause of action arising from the negligent killing of the decedent, is sufficient by implication to authorize the appointment of an administrator, and the county where the accident happened has been said to be the proper county in which to make said appointment, if the deceased was not a resident of the state.<sup>49</sup> But it seems that, from the analogy of the causes of action, in the absence of conflicting statutory provisions, the cause of action should be considered as property in the county in which the defendant resides, and, if the defendant is a corporation, then in the county where its principal office is, and, if it is a foreign corporation, then in any county in which legal service can be made upon it. This right of action is a creation of statute, and much depends upon the form of the statute. If, for instance, the statute gives the right to prosecute the claim for the benefit of the widow and next of kin, and the beneficial interest in the claim belongs to the widow and next of kin, by virtue of the statute only, and not as part of the estate of the deceased, it is not property in the county such as will authorize the grant of letters of administration upon the estate of

<sup>47</sup> *Merrill v. Insurance Co.*, 103 Mass. 245. But it has also been held that a right of action upon a life insurance policy is property in the place of residence of the deceased. *Moise v. Association*, 13 South. 170, 45 La. Ann. 736.

<sup>48</sup> *Findlay v. Railway Co.* (Mich.) 64 N. W. 732; *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 213; *Toledo, St. L. & K. C. R. Co. v. Reeves*, 35 N. E. 199, 8 Ind. App. 667; *Brown's Adm'r v. Railroad Co.* (Ky.) 30 S. W. 639; *Hutchins v. Railway Co.*, 46 N. W. 79, 44 Minn. 5. See post, p. 451, c. 22.

<sup>49</sup> *Brown's Adm'r v. Railroad Co.* (Ky.) 30 S. W. 639.

the deceased intestate, being a nonresident.<sup>50</sup> Such a right, also, as it depends upon the statute of a state, if it cannot be enforced outside of the state, is considered not to be property outside the state where the statute was enacted.<sup>51</sup>

#### TIME LIMIT FOR APPLICATION.

17. In several states a limit of time is fixed by statute, from the death of the deceased, after which an appointment as executor or administrator cannot be made. In such states an appointment made after the time limit has expired is void.

The purpose of such a limitation is to prevent the attempt to secure administration of an estate by parties not justly entitled thereto, after such a length of time that the evidences of title have become lost. The statutes vary widely in their limits. In Connecticut the limitation as to testate estate is seven years from the testator's death.<sup>52</sup> In Iowa the statute limits the time to five years from the death of the decedent, or, if he dies out of the state, from the time his death is known.<sup>53</sup> But this does not apply to an administrator de bonis non, there having been a previous administrator,<sup>54</sup> nor to administration granted as ancillary to that in another state.<sup>55</sup> And in a collateral proceeding, where the appointment of an administrator of the estate of one dying out of the state is questioned because it is proved that the appointment was made more than five years after the death, it will be presumed to have been made within five years from the time when the death was first known.<sup>56</sup> In Maine the time is limited to twenty years, unless there is money due the estate from the United States; but the limitation does not apply to foreign wills

<sup>50</sup> *Perry v. Railroad Co.*, 29 Kan. 420; *Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477.

<sup>51</sup> *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177. But see post, p. 453, c. 22.

<sup>52</sup> *Gen. St. Conn.* 1875, p. 372, § 3; *Lawrence's Appeal*, 49 Conn. 411.

<sup>53</sup> *Miller's Rev. Code*, § 2367; *Lees v. Wetmore*, 12 N. W. 238, 58 Iowa, 179.

<sup>54</sup> *Crossan v. McCrary*, 37 Iowa, 684.

<sup>55</sup> *Woodruff v. Schultz*, 49 Iowa, 430. See post, p. 151, c. 10.

<sup>56</sup> *Lees v. Wetmore*, 12 N. W. 238, 58 Iowa, 179. Cf. ante, p. 24, c. 2.

proved in another state.<sup>57</sup> In Massachusetts the period is twenty years from the death of the testator or intestate; but it is also provided that if thereafter property, claim, or right accrues to the estate, or, belonging thereto, then first comes to the knowledge of any person interested therein, original administration of that special property may be granted within five years next after it accrues or becomes known.<sup>58</sup> In Ohio the limit is twenty years, except for cause shown.<sup>59</sup> In Pennsylvania no letters of administration can be granted after twenty years from the death of the decedent, unless upon good cause shown.<sup>60</sup> No time limit exists in California<sup>61</sup> or Illinois.<sup>62</sup>

If the court grants original administration after the time limited therefor has expired the grant is void, as the court has assumed a jurisdiction expressly denied by statute.<sup>63</sup> But this is not the case if the administration is granted before the act is passed.<sup>64</sup> A mere delay in applying for a grant does not (unless by statutory provision) prevent the grant of letters.<sup>65</sup> But it may have such an effect in barring indebtedness, when that is the only foundation for a grant of letters, as to prevent the grant,<sup>66</sup> and it may cause the right of the applicant to be lost in favor of others not so near of kin.<sup>67</sup> If the statute allows the accrual of new property to revive the right of administration, the title to the property which so accrues may be doubtful, and yet authorize the granting administration, for the probate court does not try the title to property, but is satisfied with a *prima facie* right. If the court is satisfied that there is a *bona fide* claim to property, such as is proper to be settled in a court of law, it will

<sup>57</sup> Rev. St. 1883, c. 64, § 1.

<sup>58</sup> Pub. St. Mass. c. 130, §§ 3, 4; St. 1885, c. 242.

<sup>59</sup> Rev. St. § 6014.

<sup>60</sup> Brightly, *Purd. Dig. "Decedents' Estates,"* § 17.

<sup>61</sup> *Healy v. Buchanan*, 34 Cal. 567.

<sup>62</sup> *Fitzgerald v. Glancy*, 49 Ill. 469. Cf. *Ives v. Bank*, 28 Ill. App. 563.

<sup>63</sup> *Rice v. Henly*, 15 S. W. 748, 90 Tenn. 69. See ante, p. 24, c. 2.

<sup>64</sup> *Lyne v. Sanford*, 19 S. W. 847, 82 Tex. 58.

<sup>65</sup> *Ives v. Bank*, 28 Ill. App. 563.

<sup>66</sup> *Stone Land & Cattle Co. v. Boon*, 11 S. W. 544, 73 Tex. 548. But not until the debts are barred by the statute of limitations. *Shirley v. Warfield* (Tex. Civ. App.) 34 S. W. 390.

<sup>67</sup> *Lyle v. Siler*, 9 S. E. 491, 103 N. C. 261, See post, p. 118, c. 7.

grant administration. Thus, when the property was a promissory note secured by a mortgage, although the person opposing the grant had had adverse possession of the land for more than 20 years, the court granted the letters of administration.<sup>68</sup> In this case administration was applied for in 1879 on the estate of one who died in 1851, on the ground that in the latter year mortgage notes belonging to the deceased for the first time came to the knowledge of the deceased's brother, the statutory time beginning to run when such knowledge first accrued. It was held, on appeal from the decree of the probate court, that the record of the mortgage in another state, where the lands lay, was not constructive notice to the applicant of the existence of the mortgage, and it was shown that he had not had actual knowledge of the mortgage or notes.<sup>69</sup>

The rule as to the time within which application may be made for letters does not (unless so expressed in the statute) apply to administration de bonis non, which may be taken at any time.<sup>70</sup> A will may be proved at any time, even after 20 years, in order to make a title to real estate,<sup>71</sup> unless some express statute forbids. As to how soon after the death of the decedent administration should be applied for, no time is generally fixed, but it is said that application on the day of the death is scandalous, unless some urgent necessity justifies it, but letters granted on such application are not therefore void or voidable.<sup>72</sup>

<sup>68</sup> *Parsons v. Spaulding*, 130 Mass. 83. Cf. ante, p. 49.

<sup>69</sup> *Parsons v. Spaulding*, 130 Mass. 83.

<sup>70</sup> *Crossan v. McCrary*, 37 Iowa, 684; *Bancroft v. Andrews*, 6 Cush. (Mass.) 493. And see ante, p. 47, and post, p. 129.

<sup>71</sup> *Shumway v. Holbrook*, 1 Pick. (Mass.) 116; *Haddock v. Railroad Co.*, 15 N. E. 495, 146 Mass. 155.

<sup>72</sup> *In re Comfort's Estate*, 12 Pa. Co. Ct. R. 572.

## CHAPTER IV.

### WHO MAY CLAIM APPOINTMENT AS EXECUTOR.

- 18. Executor must be Named in Will.
- 19. Appointment by Delegation.
- 20-21. Executor of Executor.
- 22. Nonassignability of Office.

### EXECUTOR MUST BE NAMED IN WILL.

18. No one can be appointed an executor who is not named as such in the will, either directly or by necessary inference, except—

**EXCEPTIONS**—(a) In cases of appointment by delegation, and

(b) At common law, the executor of an executor.

The executor is essentially a creation of the testator, and therefore any person who applies to the probate court for appointment as executor must be prepared to show that he is either expressly named or in some way clearly indicated in the will as the person who is to exercise the duties of the office, and if he cannot show this his appointment must fail.<sup>1</sup> There is, however, no need that the person who applies to the court for appointment as executor should be named in the will as such, for there may be in the will an intent of the testator to intrust to the person duties and rights which form an essential part, or the whole, of the executor's office, and in such a case the person to whom these rights and duties are intrusted is called the executor, according to the tenor of the will.<sup>2</sup> Thus, where

<sup>1</sup> Hartnett v. Wandell, 60 N. Y. 350; Grant v. Spann, 34 Miss. 301. And that rule is so strictly construed in England that it has been held that an executor cannot regularly be appointed by a codicil, although an addition or substitution or withdrawal of an executor may properly be made by codicil. Swinb. pt. 5, § 4, pl. 3; Godol. pt. 2, c. 5, § 2; In re Goods of Manly, 3 Swab. Prob. Mat. & Adm. 113.

<sup>2</sup> Grant v. Spann, 34 Miss. 294; Nunn v. Owens, 2 Strobl. (S. C.) 101; Carpenter v. Cameron, 7 Watts (Pa.) 51; Hartnett v. Wandell, 60 N. Y. 350, 351;

one was made universal legatee, in trust for the widow and children, and with the duty of dividing up the property, the court was inclined to think that it amounted to the appointment of him as executor.<sup>3</sup> So, where the will read, "I want A. to attend to my business as executor," it was held an appointment of A.<sup>4</sup> So, it has been held that if one gives his goods after his death to A., to pay his debts and otherwise dispose of at his pleasure, or to that effect, it is equivalent to appointing A. his executor.<sup>5</sup> So, if the testator says, "I commit all my goods to the administration of A.,"<sup>6</sup> or "to the disposition of A.," in this case he is made executor.<sup>7</sup> So, where one is directed to pay the debts, funeral charges, and expenses of proving the will, it has been held to constitute him executor.<sup>8</sup> Again, an executor may be appointed by necessary implication arising from the use of language which shows the intention of the testator to appoint him, although there is no direct appointment. Thus, if the testator says, "I will let A. be my executor if B. will not," this gives B. the right to the office.<sup>9</sup> So, where one of two legatees was appointed executor in case another was not living after the death of the testator, this was held to give the latter a right to be executor by implication.<sup>10</sup> But in every case it is a matter of construction for the court whether, upon the language of the will, the applicant is to be considered entitled to appointment; and it should be remembered that an executor may not be instituted, nor the office of executor inferred, only by conjectural.<sup>11</sup>

Swinb. pt. 1, § 5, pl. 5; Godol. pt. 1, c. 1, § 3; *Geaves v. Price*, 32 Law J. & Tr. 56.

<sup>3</sup> *Grant v. Spann*, 34 Miss. 294.

<sup>4</sup> *Nunn v. Owens*, 2 Strob. (S. C.) 101.

<sup>5</sup> *Henfrey v. Henfrey*, 4 Moore, P. C. 33.

<sup>6</sup> Godol. pt. 2, c. 5, § 3; *Brooke*, Abr. "Executors," pl. 73.

<sup>7</sup> *Pemberton v. Cony*, Cro. Eliz. 164.

<sup>8</sup> *In re Goods of Fry*, 1 Hagg. Ecc. 80; *In re Goods of Montgomery*, 5 Notes of Cas. 99, 101.

<sup>9</sup> Godol. pt. 2, c. 5, § 3; Swinb. pt. 4, § 4, pl. 6.

<sup>10</sup> *Naylor v. Stainsby*, 2 Lee, Ecc. 54.

<sup>11</sup> *In re Goods of Woods*, L. R. 1 Prob. & Div. 556.

## SAME—APPOINTMENT BY DELEGATION.

19. A testator may give certain persons named in his will the power to select an executor, and the person selected by them is entitled to the appointment.

Thus, it has been held proper for a testator to appoint as his executor any person whom the legatees under the will, or any other person whom he names, should select.<sup>12</sup> Accordingly, in New York, where the testator appointed his wife executrix, and requested "that such male friend as she may desire shall be appointed with her as executor," it was held to be a good appointment of the co-executor, and that letters testamentary could be issued to him, although the statute in that state relating to the jurisdiction of the probate court provided that letters should be issued only to those named in the will as executors.<sup>13</sup> So it has been held in Delaware that where a testator, resident in Philadelphia at the time of making the will, but a resident of Delaware at the time of his death, provided that if the person appointed by him as executor should relinquish the trust the 'orphans' court of Philadelphia might name a suitable person as executor, and that court, in pursuance of that power, named a person after the executor named in the will had resigned the office, letters testamentary were properly issued to such appointee of the orphans' court, and not letters of administration.<sup>14</sup> And it is not uncommon for a testator to appoint executors, and to provide that upon the death of one of them the survivor or survivors may appoint another executor, who shall act with him or them.<sup>15</sup> A testator may also make various substitutionary appointments of executors, naming one or more as his first choice, and, if they cannot or will not act, then others in regular order.<sup>16</sup> In such a case the substitutionary executor cannot have probate until the prior executor has been cited to

<sup>12</sup> In re Goods of Cringan, 1 Hagg. Ecc. 548; In re Goods of Ryder, 2 Swab. & T. 127; Allen, J., in Hartnett v. Wandell, 60 N. Y. 346, 351, 352.

<sup>13</sup> Hartnett v. Wandell, 60 N. Y. 346, 351, 353.

<sup>14</sup> State v. Rogers, 1 Houst. (Del.) 569.

<sup>15</sup> Jackson v. Paulet, 2 Rob. Ecc. 344.

<sup>16</sup> Swinb. pt. 4, § 19, pl. 1; Godol. pt. 2, c. 4, § 1.



accept or refuse the office;<sup>17</sup> and if this prior executor once accepts, the right of the other is gone, since the condition on which the appointment is to vest has become impossible.<sup>18</sup>

### SAME—EXECUTOR OF EXECUTOR.

20. At common law, when a sole executor dies testate, his executor becomes *ex officio* the executor of the first will also.

21. In most of the United States this rule has been changed by statute, and an administrator with the will annexed is appointed to settle the first estate.

In all the cases mentioned heretofore the executor derives his office from the appointment in the will, and depends upon that appointment for his claim to the office, even though, as in some of the cases previously cited, he is not appointed by name, but by the choice of persons named by the testator. In the case now stated, however, the executorship is devolved upon a stranger to the will, without the choice or nomination of the testator. This rule was well settled at common law, and was recognized in some of the earlier decisions in the United States,<sup>19</sup> but in almost every state now it has been changed in the manner shown in the black-letter paragraph.

The explanation given for the common-law rule was that the power of the executor is founded upon the special confidence and actual appointment of the deceased, and this confidence extends so far as to allow him to transmit the office to another in whom he has equal confidence. So long, therefore, as the chain of representation is unbroken by any intestacy, the ultimate executor is the executor of every preceding testator.<sup>20</sup> But, even at common law, the first tes-

<sup>17</sup> *Smith v. Crofts*, 2 Lee, Ecc. 557.

<sup>18</sup> *Swinb.* pt. 4, § 19, pl. 10; *Godol.* pt. 2, c. 4, § 2.

<sup>19</sup> *Com. Dig.* "Administration," G; *Touch.* 464; *Wankford v. Wankford*, 1 Salk. 308; 2 Bl. Comm. 506; *Carrol v. Connet*, 2 J. J. Marsh. (Ky.) 195, 209; *Roanoke Nav. Co. v. Green*, 3 Dev. (N. C.) 434; *O'Driscoll v. Fishburne*, 1 Nott & McC. (S. C.) 77; *Worth v. McAden*, 1 Dev. & B. Eq. (N. C.) 199, 209; *White Schoolhouse Proprietors v. Post*, 31 Conn. 259; *Hart v. Smith*, 20 Fla. 58, 62.

<sup>20</sup> 2 Bl. Comm. 506.

tator might name some one to be executor on the death of the executor first named, and in such case the ordinary rule did not apply.<sup>21</sup> And the common-law rule is limited by the further rule that if the first executor dies intestate his administrator has no claim to act as executor of the first estate, since the administrator is merely an officer of the court appointed to administer the goods and estate of the executor, and has no privity with the estate of the testator, and an administrator de bonis non should be appointed of the estate of the testator.<sup>22</sup> Also, if the first executor died without having proved the will of his testator, it was held that his executor did not become executor of the first will.<sup>23</sup> And it has been held that a grant of letters testamentary suspended by appeal is not such a complete assumption of the office of executor as will transmit it to the next executor.<sup>24</sup>

The common-law rule that the executor of an executor is executor of the first testator never was held to apply to cases where there were two or more executors. In such cases, upon the death of one, the powers and liabilities survived to the others, and so until the last survivor, and, upon his death testate, his executor might be executor, as before stated, of the original testator;<sup>25</sup> and if only one of two executors qualified, and then died intestate, and the other qualified, the administrator of the first executor had no claim to be appointed to administer the first estate.<sup>26</sup>

#### NONASSIGNABILITY OF OFFICE.

**22. An executor cannot assign the office to another, since no one to whom a power relating to property is given by another on account of a special and personal confidence can delegate that power to another.**

<sup>21</sup> Roanoke Nav. Co. v. Green, 3 Dev. (N. C.) 434.

<sup>22</sup> Brooke, Abr. "Administration," pl. 7; Com. Dig. "Administration," B, 6; 2 Bl. Comm. 506.

<sup>23</sup> Isted v. Stanley, Dyer, 372a; Hayton v. Wolfe, Cro. Jac. 614; In re Drayton's Will, 4 McCord (S. C.) 46.

<sup>24</sup> In re Drayton's Will, 4 McCord (S. C.) 46.

<sup>25</sup> Went. Off. Ex'r, 215; In re Goods of Smith, 3 Curt. Ecc. 31.

<sup>26</sup> Crafton v. Beal, 1 Ga. 322. Cf. post, c. 11.

The foregoing rule is stated in an early English case;<sup>27</sup> and on grounds of public policy it has been held in New Jersey that an agreement to renounce the executorship, although founded upon a valuable consideration, is illegal and void.<sup>28</sup> There are, however, many cases in which an executor is, by the terms of the will, allowed to nominate or choose a co-executor. The appointment of an administrator, to act with the executor, is wholly void.<sup>29</sup>

<sup>27</sup> *Bedell v. Constable, Vaughan*, 182.

<sup>28</sup> *Ellicott v. Chamberlin*, 38 N. J. Eq. 604. As to assignment of the right to administer, see post, p. 92, c. 5.

<sup>29</sup> *Terry's Appeal*, 67 Conn. 181, 34 Atl. 1032.

## CHAPTER V.

### WHO MAY CLAIM THE RIGHT TO ADMINISTER.

- 23-24. Principle Which Governs the Right.
- 25. Order of Precedence.
- 26. Husband's Right to Administer His Wife's Estate.
- 27. Rights of Husband's Representatives.
- 28-30. Widow's Right to Administer Her Husband's Estate.
- 31-32. Right of Next of Kin to Administer.
- 33-34. How Next of Kin are Ascertained.
- 35. Preferences among Kindred.
- 36. Right of Creditors to Administer.
- 37. Right of Public Administrator to Administer.
- 38. Right of Legatees to Administer.
- 38a. Administration De Bonis Non.
- 39. Temporary Administration.
- 40. Right of Nomination to Administration.

### PRINCIPLE WHICH GOVERNS THE RIGHT.

- 23. The principle which underlies the right to administer, whether the right is settled by statute or decision of the courts, is that the grant of letters of administration shall be made to the person or persons to whom the personal property of the deceased intestate, or the greater part of it, descends, as distributees.
- 24. In most of the United States, however, the persons who are entitled to administer, and the order in which they may claim the right, are specifically declared by express statute, and the courts must follow the express provisions of the statute, even though the result may be, in exceptional cases, the granting of administration to a person not entitled to distribution of the property.

The principle that the right to administer the estate follows the right to the estate in distribution was established in the early history of the probate law, and has been recognized universally, both in this

country and England.<sup>1</sup> The reason of this principle is obvious, in that it gives the management of the property during administration into the hands of the person or persons who will ultimately own it, and whose claim upon it is only deferred till the creditors of the deceased, if there are any, are paid. In the English courts, and in a few of the United States, the principle is left undisturbed by statute, and the courts of probate decide who shall administer the estate, upon the same rules as they decide who is entitled to the estate in distribution.<sup>2</sup> This method of proceeding allows much scope to the discretion of the probate courts, and accordingly a system of rules of preference has grown up in such cases, which, while of no binding force upon the courts, are nevertheless applied by them in guiding their discretion in the choice of the administrator. These rules will be discussed later.<sup>3</sup>

In most of the United States, however, the statutes relating to the right to administer point out expressly the parties who are entitled to

<sup>1</sup> Goods of Bailey, 2 Swab. & T. 135; Goods of Pountney, 4 Hagg. Ecc. 289; Goods of Gill, 1 Hagg. Ecc. 342, per Sir T. Nicholl; Ellmaker's Estate, 4 Watts (Pa.) 34, 38; Bieber's Appeal, 11 Pa. St. 157; Hall v. Thayer, 105 Mass. 219, 224, per Chapman, C. J.; Emsley v. Young (R. I.) 31 Atl. 692; Sweezy v. Willis, 1 Bradf. (N. Y.) 495; Ga. Code, § 2498; Leverett v. Dismukes, 10 Ga. 98; Thornton v. Winston, 4 Leigh (Va.) 152; Bray v. Dudgeon, 6 Munf. (Va.) 132; Clay v. Jackson, T. U. P. Charlt. (Ga.) 71, 73; Succession of Biscoe, 2 La. Ann. 268; Anderson v. Potter, 5 Cal. 63; Cal. Code Civ. Proc. § 1365; Ward v. Thompson, 6 Gill & J. (Md.) 349; Owings v. Bates, 9 Gill (Md.) 463. The earliest statute in England which affected the right of administration provided that in cases of intestacy the ordinaries "shall depute to the next and most lawful friends" of the deceased person, intestate, to administer his goods. 31 Edw. III. St. 1, c. 11. And by a later statute it was provided that in case any person died intestate, or that the executor named in the will refused to prove it, the ordinary "shall grant administration to the widow of the deceased, or to his next of kin, or to both, as by the discretion of the ordinary shall be thought good," and, further, that when several are next of kin, in equal degrees, the ordinary may choose one or more, as he sees fit. 21 Hen. VIII. c. 5, § 3. By another statute the husband was given the right to administer his deceased wife's estate. 29 Car. II. c. 3. And these three statutes together define the extent and scope of the rule which governs the claim to administration, except as to creditors whose rights are founded on custom. 2 Bl. Comm. 505.

<sup>2</sup> Williams, Ex'rs, 419.

<sup>3</sup> Ante, p. 56, c. 5.

the right, and the order in which they may claim it. In states where this is the case the express provisions of the statutes must be followed, and the letters of administration will be granted to the person who is specially pointed out by the statute, even though the result may be to give the administration of the estate to a person who has no right to any share of it in distribution.<sup>4</sup> Thus, it has been held that where a surviving husband is by statute given the right to administer upon his deceased wife's estate letters of administration will be granted to him, even though he has no claim upon her estate in distribution, but must distribute the estate to those entitled to it.<sup>5</sup> So, when a widow has released all her claims on her husband's estate, she is nevertheless held entitled to administer if the statute gives her the right expressly.<sup>6</sup> And as to the next of kin, it has been held that if the statutes of a state mark out expressly the order in which various persons, being of kin to the deceased, are entitled to administration, that order will be followed without regard to their right to the estate, and administration will be granted to one not entitled to distribution, if he is the next of kin designated by the statute for the grant, although the statutes also name specifically the next of kin entitled to distribution.<sup>7</sup> In cases where the statutes are not express, however, the principle above stated comes into force. Thus, in cases of administration *de bonis non cum testamento annexo* it generally shifts the right to administer from the next of kin to the residuary legatee, as will be seen hereafter.<sup>8</sup> In many states this application of the principle is also recognized by statute, and in cases of administration *cum testamento annexo* the letters are directed by statute to be granted to the residuary legatee rather than the next of kin, and in some states the statute even further discriminates between the general and specific legatees and the residuary legatee.<sup>9</sup> The principle above referred to also comes into play in cases where the statutes give

<sup>4</sup> *Lathrop v. Smith*, 24 N. Y. 418; *In re Wilson*, 36 N. Y. Supp. 882, 92 Hun. 318; *Read v. Howe*, 13 Iowa, 50; *Townsend v. Radcliffe*, 44 Ill. 446; *Orear v. Crum*, 25 N. E. 1097, 135 Ill. 294.

<sup>5</sup> *Townsend v. Radcliffe*, 44 Ill. 446; *Orear v. Crum*, 25 N. E. 1097, 135 Ill. 294.

<sup>6</sup> *Read v. Howe*, 13 Iowa, 50.

<sup>7</sup> *Lathrop v. Smith*, 24 N. Y. 418.

<sup>8</sup> See post, p. 88, c. 5.

<sup>9</sup> See post, p. 88, c. 5.

the court a discretion among a class, in which case, if there is one who has an interest in the distribution larger than or in exclusion of the others, he will usually be preferred in the grant of letters, unless other countervailing circumstances oppose such preference.<sup>10</sup>

The principle above referred to has no application in cases where a special or temporary administrator is to be appointed to conserve the estate during a contest between other parties, either as to the validity of a will or the right to appointment as administrator. In such cases, as the purpose of the appointment is merely to create a temporary custodian of the property, the court will select some disinterested third person.<sup>11</sup>

#### ORDER OF PRECEDENCE.

**25.** The persons who may claim the right to administer, in the order of precedence which is generally established in the United States by statute, are as follows:

- (a) Husband or wife of deceased.
- (b) Next of kin.
- (c) Creditors.
- (d) Public administrator.

#### HUSBAND'S RIGHT TO ADMINISTER HIS WIFE'S ESTATE.

**26.** The husband has an exclusive right to be sole administrator of his wife's estate, except—

- EXCEPTIONS—**(a) In some states he may nominate another person to act in his place or jointly with him.
- (b) In some states he forms one of a class, with her next of kin, from which the administrator is selected.
- (c) Where the marriage was void, has been annulled, or has been dissolved by a divorce a vinculo, the husband has no right to administer.

<sup>10</sup> Johnson v. Johnson, 23 Atl. 106, 15 R. I. 109. See, also, post, p. 79, c. 5.

<sup>11</sup> Ellmaker's Estate, 4 Watts (Pa.) 37. See post, p. 91, c. 5.

- (d) In some states loss of interest in his wife's estate deprives the husband of his right to administer.
- (e) Personal disqualification may, it seems, take away the right.

The right of the husband to administer his wife's estate in preference to her next of kin was recognized in England at a very early date, and has been sustained, with few exceptions, until the present day, both in England and in the United States, by decisions of the probate courts and by statutes expressly affirming the right.<sup>12</sup> There has been, however, in some of the United States, an infringement of this rule, based apparently upon the fact that in those states the surviving husband is not entitled to the whole of the deceased wife's estate; and in those states the husband and next of kin of the deceased wife are made, by express statutes, a class from which the judge of probate is to select the administrator, just as the widow and next of kin are in some states, as will be seen later, made a class from which the administrator is to be selected.<sup>13</sup>

The reason for granting this right to the husband, originally, at common law in England, was to complete in him the right to his wife's personal property, which vested in him absolutely at common law, if he survived her. As to that property of hers which he already had in his possession at her death, of course no administra-

<sup>12</sup> *Humphrey v. Bullen*, 1 Atk. 459; *Sand's Case*, 3 Salk. 22; *Weeks v. Jewitt*, 45 N. H. 540, 541; *Judge of Probate v. Chamberlain*, 3 N. H. 129; *Mass. Pub. St. c. 130, § 1*; *R. I. Pub. St. c. 184, § 7*; *Weaver v. Chace*, 5 R. I. 356; *In re Harvey*, 3 Redf. Sur. (N. Y.) 214; *N. Y. 4 Rev. St. pt. 2, c. 6, tit. 2, §§ 27, 29, 30*; *McCosker v. Golden*, 1 Bradf. (N. Y.) 64; *Dewey v. Goodenough*, 56 Barb. 54, 57; *N. J. Revision*, p. 785, § 148; *Clark v. Clark*, 6 Watts & S. (Pa.) 85; *Altemus' Case*, 1 Ashm. (Pa.) 49; *Brightly*, *Purd. Pa. Dig. (10th Ed.) tit. "Decedents' Estates," § 27*; *Brightly*, *Purd. Pa. Dig. (11th Ed.) p. 512, § 29*; *Va. Code, c. 126, § 4*; *McClell. Fla. Dig. c. 2, § 5*; *Ga. Code, § 2494*; *Cal. Code Civ. Proc. § 1365*; *Hoppiss v. Eskridge*, 2 Ired. Eq. (N. C.) 54; *Patterson v. High*, 8 Ired. Eq. (N. C.) 52; *Hilborn v. Hester*, Id. 55; *Colo. Gen. St. § 3524*; *Ill. Ann. St. (Starr & C.) c. 3, § 18*; *Ind. Rev. St. 1881, § 2227*; *Ky. Gen. St. c. 39, art. 2, § 3*; *Miss. Rev. Code, § 1993*; *Ala. Code, § 2350*; *Fairbanks v. Hill*, 3 Lea (Tenn.) 732.

<sup>13</sup> *Me. Rev. St. c. 64, § 17*; *Conn. Laws 1885, c. 110, § 154*; *Del. Rev. Code, c. 89, § 9*; *Mansf. Ark. Dig. § 7*; *Goodrich v. Treat*, 3 Colo. 408. This was the case in Alabama (*Randall v. Shrader*, 17 Ala. 333) until changed by statute.



tion was necessary, as it was his absolutely, and in his possession; but in order to enable him to reduce her choses in action—e. g. debts due her—into possession after her death, by suit, it was necessary for him to obtain administration, and thus gain complete possession of her property, for which he was responsible to no one except creditors.<sup>14</sup> Therefore, if there is no need of administration for this purpose, and the husband takes the whole estate, including choses in action, by the statute of distribution, no administration is necessary. Accordingly, where, as in Maryland, the statute provides that if there are no descendants there is no necessity for the husband's taking administration, but that his wife's choses in action devolve upon him by act of law, no administration will ordinarily be granted to any one, though her next of kin may in certain cases have administration after his death, if the surviving husband does not reduce her choses in action into possession during his life.<sup>15</sup>

*Void Marriage—Divorce.*

The right of the husband to administer upon his wife's estate, whether this right is given by statute or decision, depends upon the existence of a valid marriage relation between him and the deceased at the time of her death; and therefore, if the marriage supposed to exist between them is void for any cause, the supposed husband has no right of administration. Thus, if there was a prior existing marriage, or one of the parties is non compos or under the age of lawful marriage, the supposed husband has no right to administer.<sup>16</sup> But if the marriage was only voidable, and had not been avoided by proper proceedings before the death of the wife, the husband has the right to administer.<sup>17</sup> If, however, the marriage has been dissolved, he loses his right; as, for instance, when a divorce has been granted dissolving the marriage for his adultery and desertion.<sup>18</sup> But a divorce a mensa et thoro, for the adultery of the

<sup>14</sup> Barnes v. Underwood, 47 N. Y. 351.

<sup>15</sup> Hubbard v. Barcus, 38 Md. 175. See ante, p. 12, c. 2.

<sup>16</sup> Browning v. Reane, 2 Phil. Ecc. 69.

<sup>17</sup> Elliott v. Gurr, 2 Phil. Ecc. 19. It has been held in England that a man convicted of bigamy in marrying the intestate might nevertheless apply for administration, and show that he was not guilty of that crime, although his conviction is pleaded and proved. Wilkinson v. Gordon, 2 Adams, Ecc. 152.

<sup>18</sup> Goods of Hay, 35 Law J. Prob. & M. 3.

husband, does not bar his right to administer his wife's estate, since the marital relation still exists.<sup>19</sup> No misconduct of the husband towards the wife bars his right to administer, even if it is of such a nature as to afford ground for a divorce,—such as desertion, cruel treatment, adultery, and the like,—unless a divorce a vinculo has been actually obtained and the marriage dissolved.<sup>20</sup>

*Loss of Interest in Wife's Property.*

Although the original reason for granting the husband administration upon his wife's property—e. g. his ownership of it—has been much impaired, and in some cases annihilated, by the statutes which allow married women to hold separate property, and free from their husband's control, and which give him only a portion or none of it after her death, yet the husband's right to administer, whenever it is expressly granted by statute, is not affected by the loss of interest in her property, and he is entitled to the appointment, even though he may fail to participate in the distribution.<sup>21</sup> As the right in some states still depends upon the common-law principle, a few instances of the effect upon it of his loss of interest will be given.

As the principle upon which the husband's right to administer is founded is that he is entitled to the property, it is held in England that if he loses his right to the property he also loses his right to administer; as, for instance, if a wife leaves all her property to a third person.<sup>22</sup> In accordance with this principle, in Massachusetts the statute giving him the right to administer provides that

<sup>19</sup> *Clark v. Clark*, 6 Watts & S. (Pa.) 86. Upon the general principle of what marriages are voidable and what void, and the effect of these upon the right to the administration, compare the discussion of the subject of the widow's right to administer upon her husband's estate. See post, p. 66.

<sup>20</sup> *Altemus' Case*, 1 Ashm. (Pa.) 49; *Coover's Appeal*, 52 Pa. St. 427. In England desertion has by statute an effect upon this right. Thus, it is held that, if a wife deserted by her husband obtains a protective order under St. 20 & 21 Vict. c. 85, §§ 21, 25, which provide that, as to property acquired after the date of the order, she is as if sole, and that it goes after her death as if her husband were then dead, the administration of such after-acquired property shall not go to her husband, but to her next of kin. *Goods of Worman*, 1 Swab. & T. 513.

<sup>21</sup> See ante, p. 38; *Orear v. Crum*, 25 N. E. 1097, 135 Ill. 294; *Libbey v. Mason*, 20 N. E. 355, 112 N. Y. 525; *Townsend v. Radcliffe*, 44 Ill. 446.

<sup>22</sup> *Rex v. Bettesworth*, 2 Strange, 1111.

the right belongs to the husband, unless the wife has made some testamentary or other disposition of her estate which renders the appointment of some other person necessary.<sup>23</sup> If, by antenuptial settlement, the property of the wife is held by her as her separate property, and the husband has no interest in it even after her death, and it goes to her next of kin or others, he cannot claim administration except by virtue of express statutory right.<sup>24</sup> And the same is true of a valid postnuptial release by him of all rights in her property.<sup>25</sup> But an antenuptial settlement by which the wife merely holds her property separate during her life would not have that effect, if the husband has an interest in the property after her death.<sup>26</sup> So, if the effect of the statutes allowing married women to hold their property separately is not wholly to deprive the husband of any interest in the wife's estate after her death, such statutes would not deprive him of the right at common law to administer her estate.<sup>27</sup> Even when the husband has no interest in his wife's separate estate after her death, he yet, as was said above, may be entitled by positive statute to administer it, but must distribute it to her next of kin.<sup>28</sup>

### *Disqualifications of Husband.*

It will be seen in the chapter on "Disqualifications of Executors and Administrators for Appointment" that there are various reasons why a probate judge may refuse to appoint a person as administrator, even though he be entitled to the appointment by statute. These disqualifications would apparently apply as well to a surviving husband asking for letters of administration upon his deceased wife's estate as to any other applicant for the office of administra-

<sup>23</sup> Pub. St. c. 130, § 1.

<sup>24</sup> Ward v. Thompson, 6 Gill & J. (Md.) 349; Owings v. Bates, 9 Gill (Md.) 463; Saulnier's Estate, 3 Whart. (Pa.) 442; Fowler v. Kell, 14 Smedes & M. (Miss.) 68; Bray v. Dudgeon, 6 Munf. (Va.) 132; Sheldon v. Wright, 5 N. Y. 497; Patterson v. High, 8 Ired. Eq. (N. C.) 52; Hilborn v. Hester, Id. 55; Smith v. Smith, 1 Tex. 621.

<sup>25</sup> Orear v. Crum, 25 N. E. 1097, 135 Ill. 294.

<sup>26</sup> Hart v. Soward, 12 B. Mon. (Ky.) 391.

<sup>27</sup> Barnes v. Underwood, 47 N. Y. 351; McCosker v. Golden, 1 Bradf. (N. Y.) 64; Fairbanks v. Hill, 3 Lea (Tenn.) 732; Hubbard v. Barcus, 38 Md. 175; Willis v. Jones, 42 Md. 422; Coover's Appeal, 52 Pa. St. 427.

<sup>28</sup> Townsend v. Radcliffe, 44 Ill. 446; Orear v. Crum, 25 N. E. 1097, 135 Ill. 294; Libbey v. Mason, 20 N. E. 355, 112 N. Y. 525.

tor.<sup>29</sup> It has been held that the fact that he claims a portion or the whole of what apparently constitutes her estate as his own, by gift from her before her death, does not constitute a "want of integrity" sufficient (under a statute disqualifying for such want) to allow the court to deprive him of his right to administer in a case where the whole estate of the wife would go to him in any event.<sup>30</sup>

#### SAME—RIGHTS OF HUSBAND'S REPRESENTATIVES.

**27. When the husband dies after the wife, but before taking or completing administration, in some states the personal representatives of the husband are entitled to administer; in others, the next of kin of the wife.**

If the husband dies before taking administration upon her estate, the question arises whether the administration shall be granted to his representatives, or hers. In most states, this question is answered by direct provision of the statute that the persons entitled to administration, after the husband, are the wife's next of kin. In the absence of such statutes, however, the question may arise in cases where administration upon the wife's estate is necessary after the husband's death for the purpose of reducing her choses in action to possession. Blackstone says the right of administering his wife's estate belongs to the husband or his representatives.<sup>31</sup> But the practice seems not to have been uniform in England, the ecclesiastical courts generally granting letters to the next of kin of the wife, so as to follow the statutes.<sup>32</sup> But, as these next of kin had no beneficial interest in the wife's property, chancery held them trustees for the husband's representatives.<sup>33</sup> In the United States, if no statute governs, the grant would probably be given to the husband's representatives, if the husband is entitled to the beneficial interest in the estate to be administered. Thus, in New York, the court

<sup>29</sup> Carmody's Estate, 26 Pac. 373, 88 Cal. 616. See post, p. 96, c. 6.

<sup>30</sup> Id.

<sup>31</sup> 2 Bl. Comm. 504.

<sup>32</sup> Reece v. Strafford, 1 Hagg. Ecc. 347; Wellington v. Dolman, Id. 344. Contra, Bacon v. Bryant, 11 Vin. Abr. p. 88, pl. 25.

<sup>33</sup> Elliot v. Collier, 3 Atk. 526; Whitaker v. Whitaker, 6 Johns. (N. Y.) 117.

in one case, after granting letters to the sisters of the wife, revoked them and granted administration to the executors of the husband.<sup>34</sup> In this case the court put its decision upon the ground that, as there were no descendants of the wife, the husband was entitled to all her personal property, and the sisters to none of it, and therefore administration should go to the executors of the husband's will; but in a previous case the husband's administrator was refused letters upon the wife's estate, there being no descendants, upon the ground that the right of the husband was an exception to the general rule, and personal to him.<sup>35</sup> It seems to be the practice in New Hampshire to grant letters to the representatives of the husband.<sup>36</sup> In any case, if the right is granted to the representatives of the husband, it can only be after their due appointment as such by the probate court, as until then they have no claim upon the administration of the wife's estate.<sup>37</sup>

In cases where the intestacy of the wife arises only after the death of the husband, and in regard to property in which he has no interest, his representatives have no right to administer the wife's estate,—for example, when a legacy given by the wife to take effect after her husband's death has lapsed.<sup>38</sup> But it is provided by statute in New York that if the husband, administering his deceased wife's estate, leaves, at his own death, a portion of her assets unadministered, his representatives are entitled to the administration of it.<sup>39</sup> Whenever the representatives of the husband claim to administer the estate of the wife, it lies upon them to show that the husband survived the wife; and if the husband and wife both perished by the same calamity there is no presumption that either survived the other, but the case must be made out upon proof. If this

<sup>34</sup> *In re Harvey*, 3 Redf. Sur. (N. Y.) 214. Cf. *In re Sturtzkober*, 14 N. Y. Supp. 501, 60 Hun, 576.

<sup>35</sup> *In re O'Niel*, 2 Redf. Sur. (N. Y.) 544.

<sup>36</sup> *Weeks v. Jewett*, 45 N. H. 540; *Judge of Probate v. Chamberlain*, 3 N. H. 129.

<sup>37</sup> *Goods of Crause*, 1 Swab. & T. 146; *Attorney General v. Partington*, 3 Hurl. & C. 193, 206.

<sup>38</sup> *Kearney v. Society*, 10 Abb. N. C. (N. Y.) 278.

<sup>39</sup> *In re Sturtzkober*, 14 N. Y. Supp. 501, 60 Hun, 576. Cf. *In re Harvey*, 3 Redf. Sur. (N. Y.) 214; *In re O'Niel*, 2 Redf. Sur. (N. Y.) 544.

fails, the case of the representatives of the husband fails, and administration will be granted to the next of kin of the wife.<sup>40</sup>

#### WIDOW'S RIGHT TO ADMINISTER HER HUSBAND'S ESTATE.

28. At common law, and by statute in some states, the probate court has power to appoint the widow or next of kin, or both, to administer the husband's estate.

29. By statute in some states the widow is now given preference over the next of kin, except—

**EXCEPTIONS**—(a) Where the marriage was void, has been annulled, or has been dissolved by a divorce a vinculo.

(b) In some states, where the widow has no interest in the estate.

30. Where the appointment of the widow is discretionary, these and other disqualifications will cause a denial of her application.

The origin of the right of the widow or next of kin, or both, in the discretion of the probate court, to take administration on the estate of the deceased husband, was in the statutes of 21 Henry VIII.\* This rule has been adopted in a large number of the United States by express statutes, which sometimes add the phrase "unless they renounce or are incompetent."<sup>41</sup> The reason for this rule may be found in the interest which the widow and next of kin have, as distributees, in the personal estate of a deceased husband intestate.

<sup>40</sup> Goods of Selwyn, 3 Hagg. Ecc. 748; Phene's Trusts, 5 Ch. App. 139. See Underwood v. Wing, 4 De Gex, M. & G. 633; 1 Greenl. Ev. (15th Ed.) § 30.

\* Chapter 5, § 3.

<sup>41</sup> Mansf. Ark. Dig. § 7; Conn. Laws 1885, c. 110, § 154; Kan. Comp. Laws, c. 37, § 12; Mass. Pub. St. c. 130, § 1; N. H. Gen. Law 1878, c. 195, § 2; Munsey v. Webster, 24 N. H. 126; Vt. R. L. 1880, § 2064; R. I. Pub. St. 1882, c. 184, § 4; N. J. Revision, 1709-1887, p. 758, § 28, tit. "Orphans' Court"; Brightly, Purd. Pa. Dig. 1883, p. 512, § 29; Gyger's Estate, 65 Pa. St. 311; McClellan's Appeals, 16 Pa. St. 110; Bowersox's Appeal, 100 Pa. St. 434; Mich. Ann. St. 1883, § 5849.

In others of the United States, however, the rule of the common law is changed by giving the widow a preference over the next of kin, so that the judge of probate has no discretion in the matter, but must appoint the widow if she accepts and is competent.<sup>42</sup>

Slight modifications of these rules exist in some states. For instance, in Maine, a daughter's husband is expressly included in the next of kin.<sup>43</sup> In Ohio, the principal rule is modified by the provision that, if the deceased was a nonresident, on application of a creditor administration shall be granted to him or to some other person.<sup>44</sup> In Delaware, the rule is to grant administration to one or more of the persons entitled to the residue of the personal estate.<sup>45</sup> In Connecticut, the general rule was formerly followed, provided no objection was made by a creditor or heir, or the intestate was a nonresident of the state, in which case the judge might appoint whomsoever he saw fit; but now the statute provides only for grant to widow or next of kin, or both.<sup>46</sup> In New Hampshire, the rule is expressed in the alternative, "to the widow or any of the next of kin."<sup>47</sup> But this is construed to place the widow and next of kin in the same class.<sup>48</sup> And in Maryland the rule is that administration shall be granted first to the widow or any child, at the discretion of the court, and, if no child, the widow is preferred to the next of kin.<sup>49</sup> In a few states the whole matter is left in the discretion of the judge of probate.<sup>50</sup>

<sup>42</sup> Ala. Code, § 2350; Colo. Gen. St. § 3524; Ga. Code, § 2494; Ind. Rev. St. § 2227; Iowa Rev. Code, § 2354; Read v. Howe, 13 Iowa, 50; Ky. Gen. St. c. 39, art. 2, § 3; Miss. Rev. Code, § 1993; Pendleton v. Pendleton, 6 Smedes & M. 448; Muirhead v. Muirhead, Id. 451; N. Y. 4 Rev. St. (8th Ed.) pt. 2, c. 6, tit. 2, § 27; Laws 1863, c. 362, § 3; Laws 1867, c. 782, § 6; Cluett v. Mattice, 43 Barb. 117; Cal. Code Civ. Proc. 1885, § 1365; (except in Illinois, to the public administrator, if the deceased was a nonresident) Ill. Rev. St. 1881, c. 3, §§ 18, 19; Va. Code, 1873, c. 126, § 4; McClell. Fla. Dig. 1881, c. 2, § 50.

<sup>43</sup> Rev. St. 1883, c. 64, § 17.

<sup>44</sup> Rev. St. 1880, §§ 6005, 6013.

<sup>45</sup> Del. Laws 1874, c. 89, § 9.

<sup>46</sup> Conn. Rev. St. 1875, c. 11, tit. 18, art. 2, § 2; But see, now, Conn. Gen. St. § 565.

<sup>47</sup> N. H. Gen. Laws 1878, c. 195, § 2.

<sup>48</sup> Munsey v. Webster, 24 N. H. 126.

<sup>49</sup> Md. Rev. Code 1878, art. 50, § 78.

<sup>50</sup> Wilson v. Frazier, 2 Humph. (Tenn.) 30; Swan v. Swan, 3 Head (Tenn.)

Under the rule that administration shall be granted to the widow or next of kin, or both, the court cannot, unless authorized by statute, or unless the right of nomination is recognized, appoint any one to act with the widow, except one or more of the next of kin; and if the next of kin are incompetent, as in case of infancy, or renounce, the widow is entitled to sole administration.<sup>51</sup> And if the widow renounces, or is incompetent, no one can be appointed but one or more of the next of kin, if competent and willing.<sup>52</sup> As a matter of practice, the two rules may often unite in the same result, since even under the former rule the probate court, in the exercise of its discretion, will generally appoint the widow alone, other things being equal, preferring a sole to a joint administration, on account of its greater facility for transacting business.<sup>53</sup> But if the widow has no legal preference over the next of kin, the court may refuse to appoint her, if for any reason it thinks the interests of the estate demand the appointment of the next of kin.

#### *Void Marriage—Divorce.*

The widow's right to administer her husband's estate depends upon the legitimacy of her marriage, and its existence at her husband's death; and if it is void, or has been dissolved by divorce, she cannot claim the right to administer. Thus, where either party has been previously married and the marriage still subsists at the time of the second marriage, the second wife cannot be administratrix of her husband's estate. But if the marriage is not void, but merely voidable, and has not been avoided, the right of the widow remains.<sup>54</sup> Thus, in New York a statute provides that if any person whose husband or wife absents himself or herself for five successive years, without being known to such person to be alive during that time, marries during the lifetime of such husband or wife, the marriage is void only from the time its nullity is pronounced by the proper

163; *Wright v. Wright*, Mart. & Y. (Tenn.) 43; *Williamson v. Furbush*, 31 Ark. 539.

<sup>51</sup> *McGooch v. McGooch*, 4 Mass. 348.

<sup>52</sup> *Cobb v. Newcomb*, 19 Pick. (Mass.) 336. Cf. post, c. 6.

<sup>53</sup> *Stretch v. Pynn*, 1 Lee, Ecc. 30; *Goddard v. Goddard*, 3 Phillim. Ecc. 638. Cf. post, p. 77, c. 5.

<sup>54</sup> *White v. Lowe*, 1 Redf. Sur. (N. Y.) 376; *Parker's Appeal*, 44 Pa. St. 309; *Smith v. Smith*, 1 Tex. 621; *Chapman v. Chapman* (Tex. Civ. App.) 32 S. W. 564.



court. Accordingly, in such a case it was held that a widow was entitled to administer upon her second husband's estate, although her first husband was alive when she married the second.<sup>55</sup> But if the first marriage has been dissolved by proceedings equivalent, in the country where they were had, to dissolution of marriage, before the second marriage, the second wife may have administration, although there has been no formal divorce.<sup>56</sup> If a divorce is granted, and then annulled after the death of the husband, the widow's right revives.<sup>57</sup>

*Same—Proof of Marriage.*

There must be proof that the applicant is the widow of the deceased, if this fact is denied. Marriage may be proved by evidence of cohabitation, declarations, and repute, even though admissions of the widow are put in evidence before the court to the effect that she was not married.<sup>58</sup> If the only evidence to this point is the presumption arising from cohabitation, the evidence as to the cohabitation must not be such as to make it doubtful whether the cohabitation was lawful or illicit.<sup>59</sup> In a case in Pennsylvania the testimony of the widow to the marriage, corroborated by an entry in the family Bible by the deceased, and a cohabitation and reputation of marriage for 20 years, was held to be ample evidence of a marriage, though contradicted by admissions of the widow and husband that they were not married.<sup>60</sup>

*Loss of Interest in Husband's Estate.*

If the widow is not entitled to any of the estate,—as, for instance, if she has taken the provision made for her by will,—she forfeits at common law her right to the administration, in accordance with the rule that the administration should follow the interest of the estate; but in states where the matter is governed by express statute the

<sup>55</sup> *White v. Lowe*, 1 Redf. Sur. (N. Y.) 376.

<sup>56</sup> *Ryan v. Ryan*, 2 Phillim. Ecc. 332.

<sup>57</sup> *Boyd's Appeal*, 38 Pa. St. 246. On a proceeding to settle which of two women is entitled, as widow of the deceased, to settle his estate, the court cannot decide whether one of them is entitled to share his property. *Chapman v. Chapman*, 32 S. W. 871, 88 Tex. 641.

<sup>58</sup> *Renholm v. Public Adm'r*, 2 Redf. Sur. (N. Y.) 456.

<sup>59</sup> *Brynes v. Dibble*, 5 Redf. Sur. (N. Y.) 383.

<sup>60</sup> *Bowersox's Appeal*, 100 Pa. St. 434.

right to administer is not affected.<sup>61</sup> In some states, as in California, the right is, by the express terms of the statute, made to depend upon the right to succeed to the personal estate or some part thereof. In such a case, if the husband and wife enter into a valid agreement of separation, whereby the wife, for a valid consideration, releases all rights to succeed to the personal estate, she is thereby deprived of her right to administer.<sup>62</sup> In cases of application for administration with the will annexed, as between the widow and the residuary legatee, the legatee is generally preferred. The subject will be noticed later.<sup>63</sup>

### *Disqualification of Widow.*

If the court has a choice between the widow and next of kin, it will not appoint the widow if she has eloped from her husband, or cohabited with another man,<sup>64</sup> or deserted or has lived separate from her husband.<sup>65</sup> But if the widow is solely entitled to the office a separation does not bar her right, although, by articles of separation, or antenuptial contract, she agreed to renounce all interest in her husband's estate, since her statutory right governs, and, even if there is no statute, she is still the widow, and such an agreement is of no effect.<sup>66</sup> A divorce a mensa et thoro, for adultery or other wrongdoing on her part, will lead the court to deny her appointment, if it has this option.<sup>67</sup> But such a divorce for desertion or other misconduct by the husband cannot affect her right.<sup>68</sup> An absolute divorce, for the fault of either party, deprives her of her right to administer.<sup>69</sup>

<sup>61</sup> *In re Wilson*, 36 N. Y. Supp. 882, 92 Hun, 318; *Thornton v. Winston*, 4 Leigh (Va.) 152. But see statutes of each state, and *supra*, p. 66.

<sup>62</sup> *In re Davis' Estate*, 39 Pac. 756, 106 Cal. 453.

<sup>63</sup> *Georgetown College v. Browne*, 34 Md. 456; *Govane v. Govane*, 1 Har. & M. (Md.) 346; *Bradley v. Bradley*, 3 Redf. Sur. (N. Y.) 512. See *post*, p. 88, c. 5.

<sup>64</sup> *Fleming v. Pelham*, cited 3 Hagg. 217, note; *Conyers v. Kitson*, 3 Hagg. Ecc. 556.

<sup>65</sup> *Lambell v. Lambell*, 3 Hagg. Ecc. 568; *Odiorne's Appeal*, 54 Pa. St. 175. See *Chappell v. Chappell*, 3 Curt. Ecc. 429.

<sup>66</sup> *Nusz v. Grove*, 27 Md. 400; *Read v. Howe*, 13 Iowa, 50; *Sieber's Appeal*, 1 Penny. (Pa.) 191.

<sup>67</sup> *Pettifer v. James*, Bunb. 16; *Goods of Davies*, 2 Curt. Ecc. 628.

<sup>68</sup> *Zerfass' Appeal*, 19 Atl. 1056, 135 Pa. St. 522.

<sup>69</sup> *In re Ensign's Estate*, 8 N. E. 544, 103 N. Y. 284.

But a divorce obtained by the husband by fraud—as where he deserts his wife and moves into another state, and there sues and obtains a divorce from her—does not deprive her of her right to administer.<sup>70</sup> If the evidence of the divorce is doubtful, the court will not refuse administration to the widow. Thus, where one claiming as widow showed a marriage, and the adverse party showed partial and incomplete records of a subsequent divorce and remarriage of the husband, the court held that, as the *prima facie* right was in the widow, and the evidence left it very doubtful whether any divorce was granted, the widow should be appointed.<sup>71</sup> Even when the widow is not solely entitled, a second marriage is not considered to affect her right to the position, unless there are children of the first marriage who are willing to administer.<sup>72</sup> But in a Pennsylvania case it was said that a second marriage causes the existence of other connections and affections which may be antagonistic to the husband's estate, and will influence the court in considering her application if it is merely discretionary, and not of strict right.<sup>73</sup> If the widow claims all the estate as her own, and denies that there are any assets, she is not to be appointed administratrix if the court has the option to appoint next of kin.<sup>74</sup> If the widow expressly renounces and disclaims her right, and refuses to take administration, she waives her right, and will not afterwards be allowed to cause letters issued to a third party to be revoked.<sup>75</sup>

#### RIGHT OF NEXT OF KIN TO ADMINISTER.

31. The next of kin are entitled to administration, after or with a surviving husband or a surviving widow, as the statutes may provide, and their rights are prior to those of creditors or public administrators. The statutory regulations govern the appointment, but if a discretion is given by the statute the right

<sup>70</sup> Zerfass' Appeal, 19 Atl. 1056, 135 Pa. St. 522.

<sup>71</sup> Barry's Succession, 17 South. 307, 47 La. Ann. 838.

<sup>72</sup> Webb v. Needham, 1 Addams, Ecc. 494.

<sup>73</sup> Lewis' Estate, 15 Pa. Co. Ct. R. 397.

<sup>74</sup> Id.

<sup>75</sup> Id.

to the administration should follow the interest in the property.

32. In the United States the right to administration is determined as of the time of application and at the place where application is made.

The principle that the right to administer should follow the right to succeed to the personal estate, which was stated in the previous sections, is recognized in all the states in determining who may be administrator.<sup>76</sup> But whenever the persons who are entitled to administer are expressly declared by statute, and the order in which they are entitled is stated, the person entitled under the statutes must be granted administration, if competent and willing,<sup>77</sup> even though he may not be entitled to distribution; the statute in such case overriding the principle. Thus, if there is one who is nearer of kin to the intestate than the applicant, but who is not competent to take administration because he is a nonresident, or for other disqualification, the applicant is entitled, although that other person is entitled to the personal property.<sup>78</sup>

<sup>76</sup> *Johnson v. Johnson*, 15 R. I. 109, 23 Atl. 106; *Lathrop v. Smith*, 24 N. Y. 417; *In re Thompson's Estate*, 33 Barb. (N. Y.) 334; *Public Adm'r v. Peters*, 1 Bradf. (N. Y.) 100; *Sweezy v. Willis*, 1 Bradf. (N. Y.) 495; *Churchill v. Prescott*, 2 Bradf. (N. Y.) 304; *Butler v. Perrott*, 1 Dem. Sur. (N. Y.) 9; *Brown's Estate*, 7 Kulp, 369; *Haxall v. Lee*, 2 Leigh (Va.) 267; *Hayes v. Hayes*, 75 Ind. 395; *Donahay v. Hall*, 45 N. J. Eq. 721, 18 Atl. 163; *Cramer v. Sharp*, 49 N. J. Eq. 558, 24 Atl. 962; *Munsey v. Webster*, 24 N. H. 126; *Byrd v. Gibson*, 1 How. (Miss.) 568; *Cotten v. Taylor*, 4 B. Mon. (Ky.) 357; *Halley v. Haney*, 3 T. B. Mon. (Ky.) 141; *Hawkins v. Robinson*, Id. 143; *Mullanphy v. St. Louis County Court*, 6 Mo. 563; *Anderson v. Potter*, 5 Cal. 63; *Owings v. Bates*, 9 Gill (Md.) 463. Cf. ante, p. 62, c. 5.

<sup>77</sup> *In re Nickals' Estate*, 21 Nev. 462, 34 Pac. 250.

<sup>78</sup> *Lathrop v. Smith*, 24 N. Y. 417; *Sweezy v. Willis*, 1 Bradf. (N. Y.) 495; *Churchill v. Prescott*, 2 Bradf. (N. Y.) 304; *Butler v. Perrott*, 1 Dem. Sur. 9. An exception to this principle exists in England in regard to administration with the will annexed, where the practice has always been to grant such administration to the residuary legatee, if he desires it, in preference to the next of kin, in accordance with the principle above stated, since the administration is not regarded as falling within the statute regulating the right of administration, but as being governed by the principle that the administration should follow the beneficial interest in the estate. *Pierce v. Perks*, 1 Sid. 281; *Thomas v. Butler*, 1 Vent. 217; *In re Goods of Gill*, 1 Hagg. Ecc. 341. In many of the

*Right Decided at Time of Application.*

It has been held in England that the question whether the applicant for administration is next of kin, and entitled to administer, is to be decided as of the time when the intestate died, because at that time the right to the personal property is settled;<sup>79</sup> and accordingly, if the person so entitled dies before appointment, his next of kin have the right to appointment, and not the person next entitled as next of kin to the original intestate.<sup>80</sup> In the United States, however, the right is to be decided at the time of application for letters of administration.<sup>81</sup> Questions as to whether the right has been lost by laches or statutory delay are governed by other considerations, which are examined in the chapter on "Appointment."

*Right Decided by Law of Place Where Application is Made.*

It is held in England that the right to administration should be settled by the law of the place where the deceased was domiciled, just as the right to the succession of personal property is settled by such domicile.<sup>82</sup> But in the United States, where the right to administration is determined by definite statutes, the statutes of the state where the application is made govern the right to the appointment.<sup>83</sup>

**SAME—HOW NEXT OF KIN ARE ASCERTAINED.**

**33. The next of kin of the deceased are, in most of the United States, ascertained by computation according to the method of the civil law. In a few states computation is made according to the rules of the common law, which are the same as those of the**

United States the subject is regulated by statute. This point is more fully discussed in considering this species of administration. Post, p. 128.

<sup>79</sup> *Savage v. Blythe*, 2 Hagg. Ecc. Append. 150; *Almes v. Almes*, Id. 155. So in Georgia. Code, § 494.

<sup>80</sup> 2 Hagg. Ecc. Append. 157.

<sup>81</sup> *Griffith v. Coleman*, 61 Md. 250; *Public Adm'r v. Peters*, 1 Bradf. (N. Y.) 100; *In re McLaughlin's Estate*, 37 Pac. 410, 103 Cal. 429; *In re Pingree's Estate*, 34 Pac. 521, 100 Cal. 78.

<sup>82</sup> *Goods of Beggia*, 1 Addams, Ecc. 340; *Goods of Da Cunha*, 1 Hagg. Ecc. 237.

<sup>83</sup> *Public Adm'r v. Hughes*, 1 Bradf. (N. Y.) 125; *St. Jurjo v. Dunscomb*, 2 Bradf. (N. Y.) 105.

canon law. In many states statutes expressly declare what relations of the deceased shall be considered his next of kin, giving the order in which they are entitled.

**34. Illegitimate and adopted children have no right to administer, unless the right is given by statute.**

The method of computing the degrees of kindred in the common law is that of the canon law; that is, to begin at the common ancestor, and reckon downward, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus, A. and his brother are related, in the canon law, in the first degree, for from the father to each of them is counted only one step. A. and his nephew are related in the second degree, for the nephew is two degrees removed from the common ancestor,—that is, his own grandfather, the father of A.<sup>84</sup> The method of computing the degrees of kindred in the civil law is to count upward from either of the persons related to the common ancestor, and then downward again to the other, reckoning a degree for each person ascending and descending. Thus, A. and his brother are related, in the civil law, in the second degree, for from A. to his father, the common ancestor, is one degree, and thence, descending, to the brother is another degree. A. and his nephew are related in the third degree, for ascending from A. to his father is one degree, and descending thence to his brother is a second degree, and to the brother's son a third degree.<sup>85</sup> So, a grandfather is by the civil law nearer of kin than an aunt, for it is two degrees to the grandfather, while to the aunt it is one degree more,—that is, from the grandfather to the aunt.<sup>86</sup> In only a few of the United States are the next of kin computed according to the common or canon law.<sup>87</sup> In most of them the degrees are computed according to the rules of the civil law.<sup>88</sup>

<sup>84</sup> 2 Bl. Comm. 205.

<sup>85</sup> 2 Bl. Comm. 205.

<sup>86</sup> *Sweezy v. Willis*, 1 Bradf. (N. Y.) 498.

<sup>87</sup> Md. Code 1878, art. 48, § 17; Code N. C. 1883, § 1281, rule 6; Ga. Code 1882, § 2484.

<sup>88</sup> Me. Rev. St. c. 75, § 2; Vt. R. L. 1880, § 2231; Mass. Pub. St. c. 125, § 2; Conn. Laws 1885, c. 110, § 200; Del. Rev. Code 1874, c. 85, § 2; Id. c. 5,

In many states the order in which the various classes of next of kin shall take administration is expressly enacted by statute. Thus, in New York the order is (after the widow or husband) children, father, mother, brothers, sisters, grandchildren, and other relatives of the deceased intestate who would be entitled to share in the distribution of the estate.<sup>89</sup> In California the same order is prescribed as in New York, except that the father and mother are put on an equality.<sup>90</sup> In Maryland the prescribed order, after the widow and children, is grandchildren, father, brothers and sisters, mother, other kindred.<sup>91</sup> This express enumeration obliges the court to grant to those enumerated in the order of enumeration, unless they are incompetent.<sup>92</sup> By the English practice, in regard to the grant of administration, the next of kin stand as follows: First, children and their lineal descendants to the remotest degree, then parents of the deceased,<sup>93</sup> then brothers and sisters, then grandfathers and grandmothers, then uncles and aunts or nephews and nieces, great-grandmothers and great-grandfathers, and lastly cousins.<sup>94</sup>

### *Illegitimate Children.*

A bastard has, by the common law, no kindred except his descendants, and therefore he can claim a right to administer only upon their estates,<sup>95</sup> unless further rights are given him by express statutory enactments. As to the estates of his ancestors and collaterals he is simply in the position of a stranger,<sup>96</sup> and they are so as to his estate.<sup>97</sup> But this status is altered in many states by statute, so that

§ 1; Ala. Code 1876, § 2255; Ill. Rev. St. c. 39, § 1; Mich. Ann. St. § 5776a; Iowa, Rev. Code, § 45; Wis. Rev. St. § 2272; Minn. Gen. St. c. 45, § 7; Miss. Rev. Code, § 1271; Cal. Code 1876, §§ 6389-6393; *Sweezy v. Willis*, 1 Bradf. Sur. (N. Y.) 498.

<sup>89</sup> 3 Rev. St. (5th Ed.) pt. 2, c. 6, tit. 2, § 27. Compare, on this general subject, the statutes on distribution given in chapter 19.

<sup>90</sup> Code Civ. Proc. § 1365.

<sup>91</sup> Code, art. 50, §§ 79-82.

<sup>92</sup> *Lathrop v. Smith*, 24 N. Y. 417; *Churchill v. Prescott*, 2 Bradf. (N. Y.) 304. Compare ante, pp. 63, 70, c. 5.

<sup>93</sup> *Brown v. Hay*, 1 Stew. & P. (Ala.) 102.

<sup>94</sup> 2 Bl. Comm. 505.

<sup>95</sup> *Public Adm'r v. Hughes*, 1 Bradf. (N. Y.) 125.

<sup>96</sup> *Pico's Estate*, 56 Cal. 413.

<sup>97</sup> *Saloy's Succession*, 10 South. 872, 44 La. Ann. 433. Compare statutes on distribution, post, c. 20.

an illegitimate child is the heir of his mother. Under such a statute, the grant to a bastard of administration of his mother's estate is in the power of the court.<sup>98</sup> There is no such relationship, however, as would allow the legitimate children of the same mother to claim administration of the bastard's estate.<sup>99</sup> Whether, under a statute which provides that an illegitimate child shall inherit and transmit inheritance on the part of his mother, the son of an illegitimate daughter may claim appointment as administrator of his grandmother's estate, was discussed in a case in Rhode Island, but not decided.<sup>100</sup>

### *Adopted Child.*

Unless by express provision of statute, an adopted child showing no claim to the estate is not entitled to administration on the estate of either adopted parent.<sup>101</sup>

## PREFERENCES AMONG KINDRED.

35. The following rules of preference among kindred equally near the deceased are usually followed by the courts, and in some cases declared by statute:

- (a) Sole administration is preferred to joint.
- (b) Whole blood sometimes preferred to half blood.
- (c) Male is preferred to female.
- (d) Unmarried woman is preferred to married woman.
- (e) Resident is preferred to nonresident.
- (f) One most interested in estate is preferred.
- (g) There is no preference between kindred on father's and mother's side.
- (h) Ascending is preferred to descending line.
- (i) Preference is given to one chosen by interested parties.

It will be seen that the foregoing principles will enable the judge of probate, having the necessary data before him, to arrive at the

<sup>98</sup> *Ferrie v. Public Adm'r*, 3 Bradf. (N. Y.) 249.

<sup>99</sup> *Public Adm'r v. Hughes*, 1 Bradf. (N. Y.) 125.

<sup>100</sup> *Johnson v. Johnson*, 23 Atl. 106, 15 R. I. 109.

<sup>101</sup> *McCully's Estate*, 13 Phila. (Pa.) 296.



solution of the problem who are the next of kin to the deceased intestate; but it often results that several will be found to be equally near to the deceased, and the question then arises whether administration shall be granted to all, or, if not to all, to which of them it shall be granted. In deciding upon this point, the probate court is generally given large discretionary powers, and the judge may select any one that he pleases of the class, or grant to all,<sup>102</sup> unless express statutes interfere. There are several principles of preference which are so important, and are of such general application, as to deserve notice, and it should be remembered that the rules of preference enumerated above are sometimes enacted by statute, and then become rules binding the court,<sup>103</sup> whereas at common law they are simply indications of preferable appointments.<sup>104</sup>

*Sole Administration is Preferred to Joint.*

It may be laid down as a leading principle that the court will ordinarily appoint only one administrator, as the existence of two or more administrators renders proceedings too complicated,<sup>105</sup> and it certainly will not force a joint administration upon an estate if those interested in it are unwilling.<sup>106</sup> Even when the parties interested are willing, and there are two applicants, the judge is not bound to make a joint appointment, but may in his discretion appoint only one.<sup>107</sup>

*Whole Blood Sometimes Preferred to Half Blood.*

The half blood is admitted with the whole in determining the next of kin; but if, among several of equal degree, some are of the half blood and some of the whole, the latter will generally, in absence of controlling statutes, be preferred in the appointment of an adminis-

<sup>102</sup> 2 Bl. Comm. 504; Taylor v. Delancy, 2 Caines, Cas. (N. Y.) 143; Wood's Estate (Surr.) 17 N. Y. Supp. 354; Peters v. Public Adm'r, 1 Bradf. (N. Y.) 200; Coope v. Lowerre, 1 Barb. Ch. (N. Y.) 45; Brubaker's Appeal, 98 Pa. St. 21; Levan's Appeal, 3 Atl. 804, 112 Pa. St. 298; Ala. Code, § 2354; Cal. Code Civ. Proc. § 1367; Ga. Code, § 2494. See Abb. Desc., Wills & Adm. § 108.

<sup>103</sup> Andis v. Lowe, 34 N. E. 850, 8 Ind. App. 687; Cf. ante, p. 56, c. 5.

<sup>104</sup> Lathrop v. Smith, 24 N. Y. 417; Churchill v. Prescott, 2 Bradf. (N. Y.) 304.

<sup>105</sup> Stanley v. Bernes, 1 Hagg. Ecc. 222; Leggatt v. Leggatt, 1 Lee, Ecc. 348; Dampier v. Colson, 2 Phillim. Ecc. 55.

<sup>106</sup> Brubaker's Appeal, 98 Pa. St. 21.

<sup>107</sup> Gaines' Succession, 7 South. 788, 42 La. Ann. 699.

trator.<sup>108</sup> But other rules of preference may change this; for instance, a brother of the half blood may be preferred to sisters of the whole blood, because a male administrator is preferred to a female.<sup>109</sup>

*Male is Preferred to Female.*

Females are not excluded from administration, but, as among several persons, male and female, of equal degree, other things being equal, the court will appoint a male, rather than a female;<sup>110</sup> but it is held that an unmarried daughter is to be preferred to the guardian of a minor male child.<sup>111</sup> As was stated before, if the preference of a male to a female administrator is expressed by statute, it is mandatory, and leaves the court no discretion.<sup>112</sup> But if it is merely discretionary, and the statutes do not expressly give such preference, it may be overcome by other considerations; as, for example, if the majority of those interested prefer the appointment of a female, she will generally be appointed, in preference to a male of equal degree,<sup>113</sup> or, perhaps, if she applies before a male.<sup>114</sup> So, a female resident in the state has been preferred to a nonresident minor male,<sup>115</sup> but contra under the present New York statute.<sup>116</sup>

*Unmarried Woman is Preferred to Married Woman.*

As between a married and an unmarried woman of equal degree, the unmarried woman has generally been preferred by the probate court, in the absence of countervailing circumstances, even in states where a married woman is competent.<sup>117</sup>

<sup>108</sup> *Mercer v. Morland*, 2 Lee, Ecc. 499; Cal. Code Civ. Proc. § 1366; N. Y. 3 Rev. St. (5th Ed.) pt. 2, c. 6, tit. 2, § 28; Md. Code, art. 50, § 84.

<sup>109</sup> *Single's Appeal*, 59 Pa. St. 55.

<sup>110</sup> *Chittenden v. Knight*, 2 Lee, Ecc. 559; *Wood's Estate* (Surr.) 17 N. Y. Supp. 354; *Single's Appeal*, 59 Pa. St. 55; *Sarkie's Appeal*, 2 Pa. St. 159; *Cook v. Carr*, 19 Md. 1; *Johnson v. Johnson*, 23 Atl. 106, 15 R. I. 109.

<sup>111</sup> *Cottle v. Vanderheyden*, 56 Barb. (N. Y.) 622.

<sup>112</sup> *Andis v. Lowe*, 34 N. E. 850, 8 Ind. App. 687. Cf. ante, pp. 57, 62, 69, c. 5.

<sup>113</sup> *Iredale v. Ford*, 1 Swab. & T. 305.

<sup>114</sup> *Cordeux v. Trasler*, 34 L. J. Prob. Mat. & Adm. 127; *Wood's Estate* (Surr.) 17 N. Y. Supp. 354.

<sup>115</sup> *Wickwire v. Chapman*, 15 Barb. 302.

<sup>116</sup> *Lussen v. Timmerman*, 4 Dem. Sur. 250.

<sup>117</sup> *In re Curser*, 89 N. Y. 401; *Griffith v. Coleman*, 61 Md. 252; *Smith v. Young*, 5 Gill. (Md.) 197; *Johnson v. Johnson*, 23 Atl. 106, 15 R. I. 109. See post, p. 99, c. 6.

*Resident is Preferred to Nonresident.*

Generally, a resident of the state is preferred to a nonresident, even in states where a nonresident is competent, though, if the interests of the resident are adverse to the proper settlement of the estate, the nonresident may be appointed, except in those states in which nonresidents are incompetent.<sup>118</sup>

*One Most Interested in Estate is Preferred.*

Another principle which may guide the judge in the exercise of his discretion is to select that one of the next of kin whose interest in the estate is largest, if there is any difference. This is a corollary to the proposition that the administration should follow the estate.<sup>119</sup>

*There is No Preference between Kindred on Father's and Mother's Side.*

No difference is generally made, unless by statute, between the kindred on the father's side and those on the mother's side, each being considered to stand on the same footing.<sup>120</sup> But in Maryland preference is by statute given to the kindred on the father's side.<sup>121</sup>

*Preference between Ascending and Descending Line.*

There is no such limitation upon the course of this right to administration as that it cannot follow the ascending line;<sup>122</sup> yet children are always preferred to parents,<sup>123</sup> and so brothers and sisters are preferred to grandfathers and grandmothers, although in the same degree.<sup>124</sup> It need hardly be said that an elder child does not stand in a nearer degree of kindred than a younger one,<sup>125</sup> but an elder son will generally be preferred to a younger son, merely as a matter of discretion in the court,<sup>126</sup> and the same is true as between an elder

<sup>118</sup> *Pickering v. Pendexter*, 46 N. H. 69. Cf. *Drews' Appeals*, 58 N. H. 319; *Johnson v. Johnson*, supra. Cf. post, p. 110, c. 6.

<sup>119</sup> *Horskins v. Morel*, T. U. P. Charlt. (Ga.) 69; *Warwick v. Greville*, 1 Phillim. Ecc. 125; *Moore v. Moore*, 1 Dev. (N. C.) 352. Cf. ante, pp. 62, 69, c. 5.

<sup>120</sup> *Moor v. Barham*, cited in *Blackborough v. Davis*, 1 P. Wms. 53.

<sup>121</sup> *Kearney v. Turner*, 28 Md. 408; Code, art. 50, § 89.

<sup>122</sup> *Ratcliff's Case*, 3 Coke, 40a; *Collingwood v. Pace*, 1 Vent. 414.

<sup>123</sup> 2 Bl. Comm. 504.

<sup>124</sup> *Evelyn v. Evelyn*, 3 Atk. 762; *Earl of Winchelsea v. Norcliff*, Freem. Ch. 95.

<sup>125</sup> *Earl of Warwick v. Greville*, 1 Phillim. Ecc. 124.

<sup>126</sup> *Earl of Warwick v. Greville*, 1 Phillim. Ecc. 125; *Shomo's Appeal*, 57 Pa. St. 356.

and a younger daughter,<sup>127</sup> though in one case it has been denied that seniority is any guide for preference, except by express statutes.<sup>128</sup>

*Preference is Given to One Chosen by Interested Parties.*

Probably the most important rule guiding the discretion of the judge, in modern practice, when he has a discretion to choose among several who may be appointed administrators, is that he will choose the one whom those interested in the estate, or most of them, wish to have appointed, if no material objection exists to such appointment.<sup>129</sup> And this rule is sometimes enjoined by statute.<sup>130</sup> In the absence of statute, if a majority of the next of kin unite in choosing one of their number for the office, this choice does not bind the court, since the choice of the court is discretionary among the whole number, and the court must select such one as is best qualified; yet, if there is no disqualifying objection, the court will generally appoint the one whom they have chosen.<sup>131</sup> And the reason is that those having the largest interest in the estate may, in the majority of instances, from considerations of self-interest, be safely trusted to select that person of their own number who is most competent, by reason of his integrity and business qualifications, to administer the estate honestly and successfully.<sup>132</sup>

*Miscellaneous Preferences.*

If one of the next of kin is also a creditor of the estate, the fact is adverse to his being appointed administrator;<sup>133</sup> so if he holds a large part of the estate, claiming it adversely,<sup>134</sup> and a next of kin who has had his share of the estate by advancement, and claims to hold part of it adversely to the intestate, should not be preferred to any one of

<sup>127</sup> Coppin v. Dillon, 4 Hagg. Ecc. 376; Brubaker's Appeal, 98 Pa. St. 21.

<sup>128</sup> Bowie v. Bowie, 20 Atl. 916, 73 Md. 232.

<sup>129</sup> Cramer v. Sharp, 24 Atl. 962, 49 N. J. Eq. 558; Coppin v. Dillon, 4 Hagg. Ecc. 376; Earl of Warwick v. Greville, 1 Phillim. Ecc. 125; In re Ellmaker's Estate, 4 Watts (Pa.) 34; Shomo's Appeal, 57 Pa. St. 356; McClellan's Appeal, 16 Pa. St. 110, 115.

<sup>130</sup> Mandeville v. Mandeville, 35 Ga. 243; Code Ga. § 2494.

<sup>131</sup> Cramer v. Sharp, 24 Atl. 962, 49 N. J. Eq. 558.

<sup>132</sup> Id.

<sup>133</sup> Webb v. Needham, 1 Add. Ecc. 494; Owings v. Bates, 9 Gill (Md.) 463.

<sup>134</sup> In re Bieber's Appeal, 11 Pa. St. 157. Cf. post, p. 82, c. 5.

the next of kin.<sup>135</sup> A local preference exists in Georgia, that a person entitled to administration, and offering security, shall be preferred to one having a prior right, but not offering security;<sup>136</sup> and it is enacted in that state, as a general rule for unspecified cases, that the person having the right to the estate should have the administration.<sup>137</sup> In most cases where the selection of one of a class is to be made, the statutes leave the matter to the discretion of the court; sometimes enacting the preferences which have just been enumerated, and sometimes leaving the judicial discretion wholly untrammelled.<sup>138</sup>

The rules above stated, showing preferences in granting the right of administration, are of varying force; and, if they conflict, that one will prevail which the court thinks is most advantageous for the estate, unless some statutory enactment governs. Thus, one of the whole blood may, for good cause, be selected to administer, rather than one of the half blood, although the majority of the persons interested prefer the latter.<sup>139</sup> When the court has once exercised its discretion, and an administrator has been appointed, others in the same degree of kindred, and preferable to the one already appointed, will not have any right to a similar appointment, though they might have been preferred if their claim had been put in before the appointment was made.<sup>140</sup> Since the rights of all others of a class to administer are extinguished by the appointment of one, it is held that even when all are equally entitled, or belong to a class from which the administrator is to be selected, the applicant must notify all others before he can be legally appointed. This is enacted by statute in some states,<sup>141</sup> and is unquestionably the fair and just rule; for in every proceeding of a judicial nature it is essential to its validity that the persons whose rights are to be affected should be parties, and have an opportunity to be heard.<sup>142</sup>

<sup>135</sup> *Moody v. Moody*, 29 Ga. 519; *In re Bieber's Appeal*, 11 Pa. St. 157.

<sup>136</sup> Code, § 2498. In most states, all administrators are obliged to offer security. Post, p. 182, c. 12.

<sup>137</sup> Code, § 2494.

<sup>138</sup> *Bowie v. Bowie*, 20 Atl. 916, 73 Md. 232.

<sup>139</sup> *Mercer v. Morland*, 2 Lee, Ecc. 499; *Stratton v. Linton*, 31 Law J. Prob. Mat. & Adm. 48.

<sup>140</sup> *Brubaker's Appeal*, 98 Pa. St. 21.

<sup>141</sup> *Sayre v. Sayre*, 22 Atl. 198, 48 N. J. Eq. 267.

<sup>142</sup> *Id.* See post, p. 124, c. 8.

## RIGHT OF CREDITORS TO ADMINISTER.

36. After the right of the next of kin to administer comes, in most states, the right of creditors. If neither surviving husband nor wife nor next of kin is willing or competent to take administration, a creditor of the intestate may take it, in order to secure the payment of his debt.

The right of creditors to take administration originated in England, where, by custom, if none of the next of kin will take out administration, the creditor may do so.<sup>143</sup> But this customary right is held to be wholly subordinate to the right of the next of kin, so that when the application of the creditor comes to be heard, after citation of the next of kin, any one of the latter who is entitled may have administration granted to him in preference to the applying creditor; costs, however, being given the creditor if his application was rendered necessary by undue delay on the part of the relatives.<sup>144</sup> In the United States, generally, this customary right of the creditor has been recognized and confirmed by statute with somewhat more strictness as against the next of kin; for in many states the next of kin who fail to apply for administration within a certain limited time after the death of the intestate lose their right to the administration, which is then forfeited to the creditor. In other states, however, the right of the creditor after the expiration of a limited time is, as in England, merely to cite the next of kin into court to compel them to take administration, in which case, if they refuse or neglect to do so, or are incompetent, the court will appoint the applying creditor.<sup>145</sup> The

<sup>143</sup> 2 Bl. Comm. 505.

<sup>144</sup> *Cole v. Rea*, 2 Phillim. Ecc. 428; *Jones v. Beytagh*, 3 Phillim. Ecc. 635.

<sup>145</sup> Ala. Code, § 2350; Ill. Rev. St. 1881, c. 3, § 18 ("to any creditor"); Ind. Rev. St. § 2227; Iowa Code, § 2354; Ga. Code 1882, § 2494 ("a creditor"); Cal. Code Civ. Proc. 1885, § 1365 ("the creditors"); Del. Rev. Code 1874, c. 89, § 9 ("one or more creditors"); McClell. Fla. Dig. c. 2, § 5; Ky. Gen. St. c. 39, art. 2, § 4; Md. Rev. Code 1878, art. 50 ("the largest creditor"); Ohio Rev. St. § 6005 ("one or more"); Brightly, *Purd.* Pa. Dig. p. 512, § 29; N. H. Gen. Laws, c. 195, §§ 2, 5 ("one of the creditors"); Va. Code, c. 126, § 4; Vt. R. L. § 2064 ("one or more"). Cf. *In re Li Po Tai's Estate*, 41 Pac. 486, 108 Cal. 484.

length of time which must by statute elapse after the death of the intestate before the creditor can apply for letters of administration varies in the different states. Thus, a delay of 30 days is required in some states,<sup>146</sup> and of 60 days in others.<sup>147</sup> In Iowa 20 days is required,<sup>148</sup> and in Ohio a reasonable time (18 days being held a reasonable time when the applicant resided in another county),<sup>149</sup> while in a few states no delay is required by the statute, the citation of the next of kin being considered sufficient notice to them.<sup>150</sup> This notice and citation need not necessarily be by personal service, but may be by publication in a newspaper, or in such other manner as may be ordered by the court, since, owing to the number of persons to be cited in many cases, personal citation would be costly, and perhaps impossible.<sup>151</sup> If notice is not given to the next of kin when required by statute or practice of the court, the lack of it invalidates the grant, which will be reversed on application of interested parties.<sup>152</sup> If, however, the statute provides that, after the expiration of a limited time without application by the next of kin, the creditor may at once proceed to apply for the grant of letters to himself, the court has held in some instances that it will proceed on the application of the creditor without notice to the next of kin.<sup>153</sup> This practice, however, cannot be considered advisable, as the proceeding is one affecting substantial rights of the next of kin, and of which they should be entitled in every case to notice.<sup>154</sup>

<sup>146</sup> *Cotton v. Taylor*, 4 B. Mon. (Ky.) 357; Mass. Pub. St. c. 130, § 1 (accompanied by notification of parties interested); *Arnold v. Sabin*, 1 Cush. 525; Vt. R. L. § 2064; Mich. How. Ann. St. § 5849; N. H. Gen. Laws, c. 195, § 5; *Hill v. Alspaugh*, 72 N. C. 402; Va. Code, c. 126, § 4.

<sup>147</sup> *Grantham v. Williams*, 1 Ark. 270; Ill. Rev. St. c. 3, § 18.

<sup>148</sup> Code, § 2356.

<sup>149</sup> *Todhunter v. Stewart*, 39 Ohio St. 181.

<sup>150</sup> Ala. Code, § 2350; Md. Rev. Code, art. 50, § 90; Del. Rev. Code 1874, c. 89, § 9; Cal. Code Civ. Proc. § 1365; N. Y. Rev. St. (5th Ed.) pt. 2, c. 6, tit. 2, § 27; Ga. Code, § 2494.

<sup>151</sup> *Arnold v. Sabin*, 1 Cush. (Mass.) 525. Cf. post, p. 124, c. 8.

<sup>152</sup> *Gans v. Dabergott*, 40 N. J. Eq. 184. See, on conclusiveness of appointment in collateral actions, ante, p. 19, c. 2.

<sup>153</sup> *Crossan v. McCrary*, 37 Iowa, 684. Cf. ante, p. 71, c. 5, and post, p. 124, c. 8.

<sup>154</sup> See ante, p. 71, c. 5, and post, p. 124, c. 8.

*Who is a Creditor.*

One whose claim against the estate is for the funeral expenses is a creditor of the estate. Thus, it has been held that the undertaker is a creditor,<sup>155</sup> or a relative who pays the bills of the funeral.<sup>156</sup> But one who was a creditor of the deceased by virtue of a cause of action at law which does not survive, as, for instance, a breach of promise of marriage, is not such a creditor as may take administration;<sup>157</sup> nor is the trustee of a corporation such a creditor, though the corporation itself may be.<sup>158</sup> The person applying for letters as a creditor must show, at least *prima facie*, that he has a valid claim against the estate of the decedent; and, if the facts which he alleges do not constitute a valid debt, his application will be denied. Thus, where one claimed to be a creditor for money loaned on stock of a company, and the transaction proved to be a purchase by him of stock of the company from the deceased, as treasurer of the company, it was held that these facts constituted no debt of the deceased, but, if any, one of the company, and therefore the applicant had no right to appointment.<sup>159</sup> After one creditor has been duly appointed, another creditor cannot have the appointment revoked, and himself appointed, even though he is the principal creditor, unless he alleges some disqualification in the one already appointed.<sup>160</sup> The next of kin may, by tendering a creditor the amount of his claim, deprive him of this right to administer.<sup>161</sup> The right of a creditor who has been properly appointed administrator is valid during his lifetime, as against the next of kin, but at his death the next of kin or other person entitled may claim administration *de bonis non*.<sup>162</sup>

<sup>155</sup> Fowler's Case, 16 Jur. 894; Newcombe v. Beloe, 36 Law J. Prob. & Mat. 37.

<sup>156</sup> Lentz v. Pilert, 60 Md. 296.

<sup>157</sup> Smith v. Sherman, 4 Cush. (Mass.) 412; Stebbins v. Palmer, 1 Pick. (Mass.) 71.

<sup>158</sup> Glenn v. Reid, 24 Atl. 155, 74 Md. 238. Nor is the president of a corporation to which the deceased owed a debt. Myers v. Cann, 22 S. E. 611, 95 Ga. 383.

<sup>159</sup> In re Frye's Estate, 27 N. Y. Supp. 14, 75 Hun, 402.

<sup>160</sup> Cusick v. Hammer, 36 Pac. 525, 25 Or. 472.

<sup>161</sup> Culley v. Mohlenbrock, 36 Ill. App. 84.

<sup>162</sup> Skeffington v. White, 1 Hagg. Ecc. 702.



## RIGHT OF PUBLIC ADMINISTRATOR TO ADMINISTER.

37. The public administrator is an officer appointed by the state government for the administration of such estates as are not administered by relatives of the deceased. Usually his right to administer is subordinate to the right of creditors, but in some states it is precedent, being subordinate to husband, wife, and next of kin.

The public administrator is an officer of the state, whose duty it is to administer such estates as are not claimed for administration by relatives. His duties are created by statute, but do not substantially vary from those of ordinary administration, except that in certain cases he turns over the estate, if not claimed by any person entitled to it, to the public treasury.<sup>163</sup> The right of the public administrator is subordinate to that of the husband, widow, and next of kin, and (in most states) their nominees, if the statutes allow them to nominate. In some states his right is precedent to creditors,<sup>164</sup> while in other states he is postponed to them.<sup>165</sup>

In California preference is given to public administrators over creditors.<sup>166</sup> In Connecticut a creditor may object to granting letters to any next of kin, and the court will then grant to any fit person.<sup>167</sup> In Florida administration is granted, after refusal, incapacity, etc., of the next of kin, to a creditor, or some other fit person, after six weeks' notice and citation.<sup>168</sup> In Massachusetts the creditors rank next to the next of kin, but, if none of those having the

<sup>163</sup> See post, p. 136, c. 9.

<sup>164</sup> Mass. Pub. St. c. 130, § 1, cl. 5; *In re Hyde's Estate*, 30 Pac. 804, 64 Cal. 228; *In re McKinnon's Estate*, 30 Pac. 437, 64 Cal. 226; Cal. Code Civ. Proc. § 1365; N. Y. Rev. St. (5th Ed.) pt. 2, c. 6, tit. 2, § 27; *Goddard v. Abbott*, 30 Hun, 401, 94 N. Y. 544.

<sup>165</sup> Ill. Ann. St. (Starr & C.) c. 3, § 18; *Rosenthal v. Prussing*, 108 Ill. 128; Me. Rev. St. c. 64, § 25; Va. Code, c. 126, § 4 (after three months, to sheriff or other officer); McClel. Fla. Dig. c. 2, § 15 (after six months, to sheriff).

<sup>166</sup> Code Civ. Proc. § 1365.

<sup>167</sup> Laws 1885, c. 110, § 154.

<sup>168</sup> McClel. Fla. Dig. c. 2, § 5.

prior right are in the commonwealth, then the public administrator is preferred to creditors.<sup>169</sup> In New Jersey provision for the appointment of a creditor as administrator is also made, as to the estates of intestates resident within the state, after 50 days;<sup>170</sup> but, in case of nonresident intestates leaving property in the state, 60 days' delay is necessary when a creditor applies, and, when any other person applies, then notice of not less than 30 days, or more than 6 months, is necessary; and, even in cases where the statute does not provide for notice to those first entitled, yet, if a rule of court so provides, letters issued in disregard of the rule are invalid.<sup>171</sup> In New York the public administrator of New York City takes precedence over creditors, they coming next after him.<sup>172</sup>

In every case the rank which the statute prescribes must be observed, and, if the public administrator is to be appointed only in case the next of kin renounce or are incompetent, then a decree appointing him in preference to them, without any renunciation or incompetency on their part, is irregular, and will be set aside or reversed on their application.<sup>173</sup> And so the public administrator will be postponed in right after the nominee of any party having a prior right to administration in states where the right of nomination exists.<sup>174</sup> If, at the time that the public administrator makes application for his appointment, a nominee of the next of kin for office shows that he has had due appointment by the next of kin entitled thereto, but that, owing to the distance the appointment has to come by mail, it has not yet had time to reach the court, the judge should postpone the hearing to give the document appointing

<sup>169</sup> Pub. St. 1882, c. 130, § 1.

<sup>170</sup> Revision, p. 397, § 9.

<sup>171</sup> *Gans v. Dabergott*, 40 N. J. Eq. 184.

<sup>172</sup> N. Y. Rev. St. (5th Ed.) pt. 2, c. 6, tit. 2, § 27, after 30 days' notice. But relatives not notified, or nonresidents, have 3 months to appear, after letters granted to the public administrator. *Id.* tit. 6, §§ 16-19, 32; Laws 1882, c. 410, §§ 227-237. And an application to issue letters to a relative, made after 3 months from the date of the grant of letters to the public administrator, is too late. *Tuohay v. Public Adm'r*, 2 Dem. Sur. 412.

<sup>173</sup> *In re Ming*, 38 Pac. 228, 15 Mont. 79; *In re Bergin's Estate*, 34 Pac. 867, 100 Cal. 376.

<sup>174</sup> *In re Bedell's Estate*, 32 Pac. 323, 97 Cal. 339.

the nominee to the office reasonable time to arrive in due course of mail.<sup>175</sup> But if the party making the nomination is disqualified to take the office himself,—as, for instance, if he is a nonresident, and nonresidence is a disqualification,—then his right to nominate another to the office is lost, and a nomination by him is void, and the public administrator will be appointed in preference to such nominee.<sup>176</sup> So, also, the public administrator will be preferred to the nominee of the guardian of a minor, for the only persons who can nominate are those entitled to take administration themselves.<sup>177</sup> After the public administrator has been appointed by the court, his appointment cannot be attacked collaterally, except for the same reasons as other appointments to the office.<sup>178</sup>

The fact that a public administrator has a claim against the estate does not disqualify him.<sup>179</sup> Nor, if he applies as creditor, does this estop him from withdrawing this application and taking appointment as public administrator in preference to other creditors.<sup>180</sup>

After the rights of creditors and public administrators, the matter of appointment is generally left to the discretion of the court. Thus, it is provided by statute in many of the states that the court is at liberty, if creditors make no claim, to grant administration to any fit person, even though he may have no pecuniary interest in the estate.<sup>181</sup>

<sup>175</sup> Succession of White, 12 South. 758, 45 La. Ann. 632.

<sup>176</sup> *In re Hyde's Estate*, 30 Pac. 804, 64 Cal. 228.

<sup>177</sup> *In re Woods' Estate*, 32 Pac. 516, 97 Cal. 428.

<sup>178</sup> *Dunn v. Bank*, 18 S. W. 1139, 109 Mo. 90.

<sup>179</sup> *In re Muersing's Estate*, 37 Pac. 520, 103 Cal. 585.

<sup>180</sup> *In re McKinnon's Estate*, 30 Pac. 437, 64 Cal. 226.

<sup>181</sup> *Kopper v. Coerver*, 57 Mo. App. 71; *Miller's Appeal*, 49 N. W. 427, 32 Neb. 480; Conn. Laws 1885, c. 110, § 154; R. I. Pub. St. c. 184, § 5 (after 30 days); Me. Rev. St. c. 64, § 17 (after 30 days' notice, and provided prior parties are residents of state). An appointment of a stranger before the time has elapsed is illegal, and will be revoked on application of the proper parties. *State v. Collier*, 1 Mo. App. Rep'r, 718.

## RIGHT OF LEGATEES TO ADMINISTER.

38. In cases of testacy, if the executor dies, renounces, or is incompetent, the right to letters of administration *de bonis non cum testamento annexo* goes to the residuary legatee, or, if he is incompetent or renounces, to other legatees, instead of to the husband, widow, or next of kin.

Mention should be made of the right of the residuary legatee to letters of administration *cum testamento annexo* in preference to either surviving husband, widow, or next of kin, or creditors. This right is based upon the principle, before stated, that the right to administer follows the right to the estate, or the principal interest in it. As in cases of testacy the residuary legatee has the greatest interest in the estate, it is held at common law, and is often confirmed by statute in the United States, that in case the executor dies, renounces, or is incompetent, the residuary legatee is the person entitled to letters of administration in preference to all others, whether surviving husband, widow, next of kin, or others.<sup>182</sup> And if the residuary legatee is dead, or renounces, or is incompetent, the grant of letters will go to the other legatees, in accordance with their interest, unless statutory provisions expressly direct otherwise.<sup>183</sup> And if the statute provides that administration shall go first to the residuary legatee, second to principal or specific legatees, and third to the next of kin, and a residuary legatee survives the testator, but dies before the will is admitted to probate, the right to administer does not vest in the residuary legatee's executor or administrator, but passes on to the principal or specific legatees, or, if there are none, to the next of kin.<sup>184</sup>

<sup>182</sup> *Rex v. Bettesworth*, 2 Strange, 1111; Mass. Pub. St. c. 130, § 1; *Govane v. Govane*, 1 Har. & M. H. (Md.) 346; President, etc., of Georgetown College *v. Browne*, 34 Md. 456; *Bradley v. Bradley*, 3 Redf. Sur. (N. Y.) 512; *In re Brown's Estate* (Surr.) 11 N. Y. Supp. 785; *Pierce v. Perks*, 1 Sid. 281; *Thomas v. Butler*, 1 Vent. 217.

<sup>183</sup> *In re Brown's Estate* (Surr.) 11 N. Y. Supp. 785.

<sup>184</sup> *In re Brown's Estate* (Surr.) 11 N. Y. Supp. 785; *Kooystra v. Buyskes*, 3 Phillim. Ecc. 531; *West v. Willby*, Id. 381.

In many of the states it is provided that such administration shall be granted to the person who would be entitled to administration if the deceased had died intestate.<sup>185</sup> In New Hampshire devisees rank in such case with creditors,<sup>186</sup> while in Connecticut the grant is first to the husband, wife, or next of kin, and second to one of the principal creditors, or some other suitable person;<sup>187</sup> but in case of a nonresident testator the appointment is in the discretion of the court, who will naturally prefer resident creditors to nonresident heirs.<sup>188</sup> In New Jersey a similar statutory provision exists; but in this state the courts overrule the statute, and declare that the residuary legatee takes preference of the widow, next of kin, etc.<sup>189</sup> In other states the rule of the English courts has a partial recognition, and it may be observed that the tendency of the courts to favor the appointment of the residuary legatee is very strong, even when express provisions of statute exist.<sup>190</sup> Thus, in Pennsylvania a residuary legatee is given the preference.<sup>191</sup> In Michigan the preference is first to any of the beneficiaries, and second to such person as would have been entitled in case of intestacy.<sup>192</sup> In Maryland the right goes first to the widow, and next to the residuary legatee, males being preferred to females.<sup>193</sup> In New York the right belongs—First, to one or more of the residuary legatees; second, to one or more of the principal specific legatees (minors being represented by their guardians); third, to the husband or wife, or to one or more of the next of kin, or to one or more of the heirs or dev-

<sup>185</sup> Cal. Code Civ. Proc. § 1350; Vt. R. L. § 2064; Va. Code, c. 126, § 2; Ohio Rev. St. § 6000; Ill. Rev. St. c. 3, § 1; Me. Rev. St. c. 64, § 20; Ga. Code, §§ 2440, 2491, 2494; *Long v. Huggins*, 72 Ga. 776. In Massachusetts the right goes to the widow of the deceased, or his next of kin, or to such other person as would have been entitled thereto if the deceased had died intestate. Pub. St. c. 130, § 6.

<sup>186</sup> Gen. Laws, c. 195, § 7.

<sup>187</sup> Laws 1885, c. 110, § 141.

<sup>188</sup> *Lawrence's Appeal*, 49 Conn. 411.

<sup>189</sup> N. J. Revision, p. 758; *Kirkpatrick's Estate*, 22 N. J. Eq. 463.

<sup>190</sup> *Bradley v. Bradley*, 3 Redf. Sur. (N. Y.) 512.

<sup>191</sup> *Brightly*, *Purd. Pa. Dig.* pp. 509, 513; *Ellmaker's Estate*, 4 Watts, 34. It has also been held proper to appoint the nominee of an executrix who refuses to act. *Coleman's Estate*, 15 Pa. Co. Ct. R. 252.

<sup>192</sup> Ann. St. § 5838; Laws 1885, No. 144.

<sup>193</sup> Rev. Code, art. 50, § 94.

isees; fourth, to one or more of the creditors.<sup>194</sup> And if several would be thus entitled the one having the largest interest in the estate should be chosen, if not otherwise unsuitable.<sup>195</sup> In Rhode Island the right is—First, to one or more devisees or legatees; second, to one or more of the principal creditors, or to some other suitable person.<sup>196</sup> And in Delaware the only rule given by statute is that a legatee shall be preferred to a creditor.<sup>197</sup> The right, when it is given by statute, is an absolute one, binding the judge, and not leaving it in his discretion to pass by the one having such right and appoint another.<sup>198</sup>

### ADMINISTRATION DE BONIS NON.

#### 38a. The right of appointment as administrator de bonis non devolves, in most states, as in cases of ordinary administration.

When administration de bonis non becomes necessary, by the death, resignation, or removal of an administrator, the right devolves as in cases of ordinary administration, in many of the United States.<sup>199</sup> But in the states named below no particular rules are prescribed, and letters are granted to some suitable person, in the discretion of the court.<sup>200</sup> If the estate is insolvent, and a settlement of it has been made by a previous administratrix, a creditor may be appointed administrator de bonis non.<sup>201</sup>

<sup>194</sup> N. Y. Code Civ. Proc. § 2643; Rev. St. p. 2552; *In re Allen's Estate*, 2 Dem. Sur. 203; *Bradley v. Bradley*, 3 Redf. Sur. 512; *In re Ward*, 1 Redf. Sur. 254; *Cluett v. Mattice*, 43 Barb. 417.

<sup>195</sup> *Quintard v. Morgan*, 4 Dem. Sur. 168.

<sup>196</sup> R. I. Pub. St. c. 184, § 2.

<sup>197</sup> Del. Rev. St. § 1779.

<sup>198</sup> *Blanck v. Morrison*, 4 Dem. Sur. 297. But see note 189.

<sup>199</sup> Cal. Code Civ. Proc. § 1426; *Pico's Estate*, 56 Cal. 413; Ill. Rev. St. c. 3, § 38; N. Y. Code Civ. Proc. § 2693; Del. Rev. St. § 1780; N. H. Gen. Laws, c. 195, § 7; Md. Rev. Code, art. 50, § 107; Fla. Dig. c. 2, §§ 15, 83; *Brightly*, *Purd. Pa. Dig.* pp. 509, 510.

<sup>200</sup> Ohio Rev. St. § 6018; Me. Rev. St. c. 64, § 21; Mass. Pub. St. c. 130, § 9; *Russell v. Hoar*, 3 Metc. (Mass.) 187; Vt. R. L. § 2072; Mich. Ann. St. §§ 5843, 5857, 5860; Conn. Laws 1885, c. 110, §§ 28, 31; Ga. Code, § 2490; R. I. Pub. St. c. 184, §§ 22, 24, 26; N. J. Revision, p. 396, § 2; *Id.* p. 781.

<sup>201</sup> *Tillson v. Ward*, 46 Ill. App. 179.

## TEMPORARY ADMINISTRATION.

39. In cases of contest in the appointment an administrator, some indifferent person is usually made temporary administrator to care for and preserve the property.

In case of the appointment of a temporary administrator,—e. g. *pendente lite*, in case of contest over a will, or otherwise,—the principle that the grant follows the interest in the estate has no application, for the object of the grant of letters is merely to put the estate in safe custody while the parties interested are in litigation. The court will therefore generally decline to appoint a litigant, and will appoint a nominee presumed to be indifferent between the parties.<sup>202</sup> In some states the court gives preference to the person named as executor, or to the next of kin, as it always may, the matter lying in its discretion,<sup>203</sup> and no one has any claim upon the office except by special statutory provision.<sup>204</sup> In New York, in a recent case, the surrogate held that the person named as executrix in the will should, from motives of economy, be preferred as temporary administratrix.<sup>205</sup>

If, however, the executor is charged with having exercised an undue influence upon the testator, he will not be appointed,<sup>206</sup> and the question of his fitness must be decided in each case upon its own merits.<sup>207</sup> If he has an interest hostile to the estate, he plainly should not be so appointed.<sup>208</sup>

<sup>202</sup> *Ellmaker's Estate*, 4 Watts (Pa.) 37; *Plath's Estate*, 9 N. Y. Supp. 251, 56 Hun, 223; *Young v. Brown*, 1 Hagg. Ecc. 54; *Stratton v. Stratton*, 2 Lee, Ecc. 49; *Dietz v. Dietz*, 38 N. J. Eq. 484; *Mootrie v. Hunt*, 4 Bradf. (N. Y.) 173; *Eddy's Estate*, 31 N. Y. Supp. 423, 10 Misc. Rep. 211; *Ellmaker's Estate*, 4 Watts (Pa.) 37.

<sup>203</sup> Ga. Code, §§ 2489, 2494; Md. Rev. Code, art. 50, §§ 97, 105; *Cain v. Warford*, 3 Md. 454; Me. Rev. St. c. 64, § 32; Cal. Code Civ. Proc. § 1411; *Doak's Case*, 46 Cal. 573.

<sup>204</sup> *Dietz v. Dietz*, 38 N. J. Eq. 484, and note.

<sup>205</sup> *Haas v. Childs*, 4 Dem. Sur. (N. Y.) 137.

<sup>206</sup> *Cornwell v. Cornwell*, 1 Dem. Sur. (N. Y.) 1.

<sup>207</sup> *Jones v. Hamersley*, 2 Dem. Sur. (N. Y.) 286; *Matter of Bankard*, 19 Wkly. Dig. N. Y. 452.

<sup>208</sup> *Howard v. Dougherty*, 3 Redf. Sur. (N. Y.) 535.

## RIGHT OF NOMINATION TO ADMINISTRATION.

40. The right to administration is a personal right, which cannot be assigned; nor, unless by statutory power, can one entitled to administer nominate a person to be appointed in his stead, except in cases of non-residents, who, if not incompetent themselves for the office, by reason of their nonresidence, may nominate some one to be appointed in their stead. By statute, however, in many states, all persons entitled to appointment as administrators may nominate others in their places.

As is stated above, the right to administer is considered at common law, in England, a personal right; and, if the person to whom it belongs is unwilling to avail himself of it, it passes to the person next entitled. The only exception at common law to this rule is that, when a person entitled to administer resides out of the country, he may, by power of attorney, appoint some one resident in the county to take administration in his place.<sup>209</sup> But, in case of persons resident in the country, such a power of attorney is not valid in England, by common law.<sup>210</sup>

In many of the United States, however, by statute or by judicial decision, the person entitled to administration, whether resident in the state or not, may nominate some other person to the administration in his stead.<sup>211</sup> Thus, where a widow renounced administration in favor of her son, the court held that he was entitled to the appointment in preference to next of kin.<sup>212</sup> And, if the person who is entitled to administer renounces in favor of another, the appointee may proceed to have letters which have been wrongfully granted to a third person revoked, and himself appointed instead.<sup>213</sup> So, where the widow, not being solely entitled to act, but being in a class with the next of kin, refused to act herself, but nominated a

<sup>209</sup> Rule 32, P. R. (noncontentious business).

<sup>210</sup> *In re Goods of Burch*, 2 Swab. & Tr. 139.

<sup>211</sup> *Meyer's Estate*, 18 S. E. 689, 113 N. C. 545.

<sup>212</sup> *Shomo's Appeal*, 57 Pa. St. 358.

<sup>213</sup> *Williams v. Neville*, 13 S. E. 240, 108 N. C. 559.



third person, the court held that the action of the register in appointing her nominee, in the exercise of his discretion, was in accordance with well-settled practice.<sup>214</sup> For similar reasons, if the person having the right to administer desires to have another associated with him, it would seem that the court might favor this application, unless prevented by some countervailing circumstances.<sup>215</sup>

In other states it is held that the right to administer is merely personal, and does not include the right or power on the part of the person possessing it to nominate or select another person to be appointed in his stead.<sup>216</sup> When the power of nomination is conferred by express statutes, it will be limited to the persons named in the statute, and will not be extended to their representatives. Thus, if sons and daughters have the right of nomination by statute, yet, if one of them is a minor, his guardian will not have the right, unless it is expressly given him by statute.<sup>217</sup> If the power of nomination is exercised with due diligence, the appointment of the nominee will not be defeated because, by reason of the distance which the letter or document nominating him has to travel to reach the court, it does not arrive till after the hearing, for the court will postpone the hearing upon proof of these facts.<sup>218</sup>

The right of persons who are entitled to administer, but who reside out of the state, to appoint some resident of the state to take administration in their stead, is in some states recognized, at least as far as a surviving husband, widow, and next of kin are concerned, without regard to statutes.<sup>219</sup> But by statute in some states non-residence in the state renders the person otherwise entitled to administer incompetent, and in such case his appointee is also incompetent, and the appointment is nugatory.<sup>220</sup> And a nonresident,

<sup>214</sup> Coleman's Estate, 15 Pa. Co. Ct. R. 252.

<sup>215</sup> Meyer's Estate, 18 S. E. 689, 113 N. C. 545.

<sup>216</sup> *In re Cresce*, 28 N. J. Eq. 236, 237; *Cramer v. Sharp*, 24 Atl. 962, 49 N. J. Eq. 558.

<sup>217</sup> Wood's Estate, 32 Pac. 516, 97 Cal. 428.

<sup>218</sup> Succession of White, 12 South. 758, 45 La. 652.

<sup>219</sup> *Smith v. Munroe*, 1 Ired. (N. C.) 345.

<sup>220</sup> *Sutton v. Public Adm'r*, 4 Dem. Sur. (N. Y.) 33; *Carr's Estate*, 25 Cal. 585; *Beech's Estate*, 63 Cal. 458; *Muersing's Estate*, 37 Pac. 520, 103 Cal. 585; *Donovan's Estate*, 38 Pac. 456, 104 Cal. 623; *Hyde's Estate*, 30 Pac. 804, 64 Cal. 228. C2. post, p. 110, c. 6.

in such a case, if he wishes to gain a right to nominate, must become a bona fide resident of the state, which involves actual residence in the state, and intention to become a resident. The court judges whether the nonresident has, upon all the evidence, become a bona fide resident. Thus, where a person came into the state, upon his brother's death, to look after his affairs, and stayed a few days, bringing his daughter with him, and leaving his wife in his former residence, and then applied for letters of administration for his nominee, the court held that he had not gained a bona fide residence, although he testified directly that it was his intention to become a resident when he made the change, but he could not say how long he should keep the residence thus acquired.<sup>221</sup> Generally, if the person entitled to administration is incompetent for any cause, his right of nomination fails,<sup>222</sup> and, except as above stated, no right of nomination exists.<sup>223</sup>

As was said above, in many of the United States the right of nomination is conferred by express statutes. Thus, in California any person entitled may nominate or appoint some other person to be administrator,<sup>224</sup> and the same power exists in Georgia.<sup>225</sup> But this privilege belongs only to the widow and next of kin in other states,<sup>226</sup> while in Massachusetts<sup>227</sup> it belongs to the husband, widow, and

<sup>221</sup> Donovan's Estate, 38 Pac. 456, 104 Cal. 623.

<sup>222</sup> Sutton v. Public Adm'r, 4 Dem. Sur. (N. Y.) 33, and cases above, note 145; Kelly's Estate, 57 Cal. 81. This right to administration has been held in Maryland to be capable of sale, and if the person entitled to administer agrees to transfer the right to another, for good consideration, the contract is binding and will be enforced. Brown v. Stewart, 4 Md. Ch. 368; Bassett v. Miller, 8 Md. 548. But the contrary is held in Pennsylvania. Bowers v. Bowers, 26 Pa. St. 74. See ante, p. 92.

<sup>223</sup> Guldin's Estate, \*81 Pa. St. 362; McClellan's Appeal, 16 Pa. St. 110, 115; In re Root, 5 N. Y. Leg. Obs. 449; In re Ward, 6 N. Y. Leg. Obs. 111; Georgetown College v. Brown, 34 Md. 450; McBeth v. Hunt, 2 Strobb. (S. C.) 335; Ex parte Ostendorff, 17 S. C. 22; In re Cresse's Estate, 28 N. J. Eq. 236; Rea v. Englesing, 56 Miss. 463; Miss. Code, § 1993; Randall v. Shrader, 17 Ala. 333.

<sup>224</sup> Code Civ. Proc. §§ 1365, 1378; Bedell's Estate (Cal.) 32 Pac. 323.

<sup>225</sup> Code, § 2494; Halliday v. Du Bose, 59 Ga. 268.

<sup>226</sup> N. H. Gen. Laws, c. 195, § 2; Mich. Ann. St. § 5849; Vt. R. L. § 2064.

<sup>227</sup> Pub. St. c. 131, §§ 2, 3.

next of kin, but only in case of their nonresidence in the state.<sup>228</sup> In other states, if the person entitled consent or request, one or more other persons may be joined with him in the administration.<sup>229</sup>

<sup>228</sup> Cobb v. Newcomb, 19 Pick. (Mass.) 337.

<sup>229</sup> Del. Rev. Code, 1874, c. 89, § 9; Shropshire v. Withers, 5 J. J. Marsh. (Ky.) 210; N. Y. Rev. St. (5th Ed.) pt. 2, c. 6, tit. 2, § 34; Williams' Case, 1 Tuck. 8 (consent in writing is necessary); Md. Code, art. 50, § 72 (all those interested in all the personalty in the state must consent); Phillips v. Green, 4 Heisk. (Tenn.) 350.

## CHAPTER VI.

### DISQUALIFICATIONS FOR THE OFFICE OF EXECUTOR OR ADMINISTRATOR.

- 41-42. Infancy a Partial Disqualification.
- 43-45. Married Women—How Far Competent.
  - 46. Idiots, Lunatics, and Insane Persons are Incompetent.
  - 47. Poverty and Insolvency—How Far a Disqualification.
  - 48. Convicts—How Far Disqualified.
- 49-50. Alienage, Nonresidence—How Far a Disqualification.
  - 51. Religious Belief—How Far a Disqualification.
  - 52. Surviving Partners—Sometimes Disqualified.
  - 53. Corporations—How Far Competent.
  - 54. Absolute and Discretionary Incompetency.

#### INFANCY A PARTIAL DISQUALIFICATION.

- 41. An infant is incompetent to act either as executor or administrator. If such a one is named as sole executor, administration durante minoritate should be granted to some suitable person, preferably his guardian. If there are other persons named as executors, they should be appointed, and act till the infant becomes of full age, when he may join them as co-executor.
- 42. If the person who is entitled to administration is an infant in some states it is held that he is incompetent, and the next in rank should be appointed, while in others, his guardian is to be appointed administrator durante minoritate.

The rules as to the person to whom letters executory or of administration are to be granted when the person entitled is an infant are generally established by statute in the United States, and these statutes generally embody the rules stated above in the black-letter paragraph. These rules are, with one exception, statements of the

rules of the English ecclesiastical courts on this subject.<sup>1</sup> By the English practice, the disability of infancy or minority was at first only extended till he reached the age of 17 years, but by a statute of George III. this period was extended till he was 21 years old; and this latter age is the one usually adopted in the United States, both as to executors and administrators, in the statutes of the various states.

Exceptions to this rule are found, however, in several states. Thus, in Maryland, the age at which a person becomes competent to act as executor or administrator is 18 years, and, in order to provide security for his proper management of his estate, it is further provided that the bond given by a minor appointed executor or administrator binds him as if he were of full age.<sup>2</sup> In Georgia a minor may be appointed and act as executor if this is expressly directed by the testator,<sup>3</sup> and the widow may be appointed as administrator, irrespective of age;<sup>4</sup> and in Arizona a surviving husband or wife

<sup>1</sup> Infancy has always been held, to a limited extent, one of the recognized disabilities to acting as either executor or administrator, although it was no objection to being named as executor, even before the infant's birth. Went. Off. Ex'r, c. 18, p. 390; 2 Bl. Comm. 503. And, if a child in ventre sa mere was named as executor, it was the law in England that, if the mother gave birth to more than one child, they were all to be admitted as executors. Godol. pt. 2, c. 9, § 1. By common law, however, no infant could act as executor till he reached the age of 17, nor could one act as administrator till he was of full age. 2 Bl. Comm. 503; Went. Off. Ex'r, c. 18; Goods of Duchess of D'Orleans, 1 Swab. & Tr. 253. And by later statute, in England, if the infant was named as sole executor the period of his disability was extended to cover the whole period of his minority. 38 Geo. III. c. 87, § 6. In both cases, if the person entitled to be executor or administrator was under age, and was the only person so entitled, letters were granted during his minority to some other person, as the court saw fit,—in case of an infant executor, generally to his guardian. 38 Geo. III. c. 87, § 6; Goods of Duchess of D'Orleans, 1 Swab. & Tr. 253; Blanck v. Morrison, 4 Dem. Sur. (N. Y.) 297. If there were other executors named in the will in such case, they received their appointment, and acted until the infant executor reached full age, when he was admitted as executor with the others. Williams, Ex'rs, 271.

<sup>2</sup> Md. Rev. Code, 1878, art. 50, §§ 60, 67, 74; Davis v. Jacquin, 5 Har. & J. 110.

<sup>3</sup> Ga. Code, 1882, § 2439; Hamilton v. Levy, 19 S. E. 610, 41 S. C. 374.

<sup>4</sup> Code, § 2494.

may be appointed executor or administrator though under 21 years of age.<sup>5</sup>

The exception above referred to, wherein the statutes of the United States, as stated in the black-letter text, differ from the practice of the English probate courts, is the rule as to the grant of letters of administration when the person entitled to them is under age. In the English courts, where the right to administer the estate, like the right to be an executor, is considered as a valuable property right, the rule is that some person of full age—preferably the guardian of the minor, if there is one—shall be appointed administrator *durante minoritate*, so as to preserve the administration for the minor till he comes of full age, or at any rate to administer it in his interest.<sup>6</sup> In the United States, however, where the right to administration is not considered as a valuable property right, but rather as a claim to an office in the nature of a trust, the statutes are not uniform as to the procedure in case a person entitled to the appointment as administrator is under age. In some states they follow the English rule, and provide that the appointment *durante minoritate* should be given to the guardian of the infant, so that the infant's right to administration may not be lost,<sup>7</sup> while in other courts it is held that the fact that the person entitled to administer is under age is simply a disqualification, and the right to the appointment passes to the next of kin.<sup>8</sup> In any case, if under the statutes of a state, one of the persons entitled as a class to an appointment as administrator is under age, while one or more of the others equally entitled are of full age, the judge will, in the exercise of his discretion, select one of those of full age. Even in those states where the appointment is to be made of the guardian of the infant, a guardian appointed in another state cannot claim the right, but must yield to next of kin.<sup>9</sup>

<sup>5</sup> Ariz. Comp. Laws, 1877, § 1559.

<sup>6</sup> Williams, Ex'rs, p. 450.

<sup>7</sup> *Blanck v. Morrison*, 4 Dem. Sur. (N. Y.) 297; *In re Tyler*, 6 Dem. Sur. (N. Y.) 48. Contra, *Knox v. Nobel*, 28 N. Y. Supp. 355, 77 Hun, 230; *In re Nickals' Estate*, 34 Pac. 250, 21 Nev. 462; *In re Lasak*, 8 N. Y. Supp. 740, 55 Hun, 610.

<sup>8</sup> *Rea v. Englesing*, 56 Miss. 463.

<sup>9</sup> *In re Nickals' Estate*, 34 Pac. 250, 21 Nev. 462. Cf. ante, p. 79, c. 5.

The appointment of an infant as executor or administrator by the court is not void, but only voidable.<sup>10</sup> And if the minor remains in administration without objection till of age, and then affirms all the acts of administration, including the bond, the appointment will not be revoked.<sup>11</sup>

#### MARRIED WOMEN—HOW FAR COMPETENT.

43. In those states where the subject has not been specifically changed by statute, the rule remains as at common law, and a married woman may be appointed either executrix or administratrix, with her husband's consent, which in some states must, by statute, be in writing, and filed with the judge of probate. If this consent is given, and the wife is appointed to the office, the husband joins her administration bond, and becomes jointly liable with her for all her acts, and may himself assume the conduct of the administration.
44. In many states, by statute, a married woman may be appointed either executrix or administratrix with the same effect as if she were a feme sole.
45. If an unmarried woman is appointed executrix or administratrix, and marries, the result at common law is that she is supposed by her marriage to consent to her husband's administering for her, and the administration is thereupon to be conducted as if she had been married when she was appointed to the office. This rule has been changed by statute in several of the United States, and it is provided that, if an unmarried executrix or administratrix marries, her authority ceases, and if she is alone in the office an administrator de bonis non should be appointed.

<sup>10</sup> Davis v. Miller (Ala.) 17 South. 323. As to conclusiveness of decrees of probate court, see ante, p. 19, c. 2.

<sup>11</sup> Id.

A married woman, by the canon law, might be either executrix or administratrix without the consent of her husband.<sup>12</sup> By the common law, however, the assent of her husband was necessary, as he must enter into the administration bond,<sup>13</sup> and practically became the administrator, to all intents and purposes. If she objected to assuming the office, the husband could not compel her to proceed in it,<sup>14</sup> but he might proceed himself in the administration, and she could not object during his life.<sup>15</sup> After his death, if she had never intermeddled with the administration, she might refuse to enter into it.<sup>16</sup>

The status of the married woman as executrix or administratrix under the common-law rules was that of a mere agent of the husband, who was entitled to direct the administration and keep all the benefits, just as he was entitled to all the other estate of his wife. He also became liable for her acts in the office, on the same principle, and it was for this reason that his consent was necessary to her undertaking the duties of the office. This status is affirmed in some of the United States by statute or decision.<sup>17</sup> In others, the statutes, following out the modern idea of making married women independent of their husbands in the management of their property, give to married women the right to be appointed and act as executors or administrators as fully and freely as if they were unmarried,<sup>18</sup> though it is presumed that even in those states, if a married woman is one of a class entitled to appointment as administratrix, the court, in the exercise of its discretion, will give preference to an unmarried woman or to a man.<sup>19</sup>

<sup>12</sup> Godol. pt. 2, c. 10, § 3.

<sup>13</sup> Com. Dig. "Administrators," B. 6; Id. D.; Went. Off. Ex'r, 377; Thrustout v. Coppin, 2 W. Bl. 801.

<sup>14</sup> Godol. pt. 2, c. 10, § 1; Went. Off. Ex'r, 376.

<sup>15</sup> Godol. pt. 2, c. 10, § 1; Went. Off. Ex'r, 278; Wankford v. Wankford, 1 Salk. 306, per Lord Holt; Thrustout v. Coppin, 2 W. Bl. 802.

<sup>16</sup> Stokes v. Porter, 2 Dyer, 166b; Beynon v. Gollins, 2 Brown, Ch. Cas. 323; Adair v. Shaw, 1 Schoales & L. 258.

<sup>17</sup> Ala. Code, 1876, §§ 2342, 2355; Ind. Rev. St. 1881, § 2230; Gyger's Estate, 65 Pa. St. 311; Guldin's Estate, \*81 Pa. St. 362; Stewarts' Appeal, 56 Me. 300.

<sup>18</sup> Maryland, Massachusetts, Montana, New York. See the statutes of those states.

<sup>19</sup> Ante, p. 78, c. 5.



In other states the statutes vary between the two extremes. Thus, in California, and those neighboring states whose statutory codes are based upon that of California, statutes provide that a married woman, if she is named as executrix by the testator, may serve as if sole, but that no married woman shall be appointed administratrix.<sup>20</sup> In this state it is held that, if a sole administratrix marries, the marriage does not ipso facto avoid the letters, but merely forms a cause of revocation, and if she has already brought suit the suit may be carried on by her until her letters are revoked.<sup>21</sup>

In Georgia a married woman may act in either of these offices, and her separate estate is bound as if she were sole,<sup>22</sup> though previously she was disqualified by statute from acting in these capacities.<sup>23</sup> In Connecticut a married woman may be executrix or administratrix, if she is the heir at law of the deceased, without her husband's consent. In such a case she may sue and be sued as if sole, and her husband is not liable for her acts, unless he directs them. She may give a separate bond, and all her estate is liable if her husband indorses his consent on the bond; but, if he does not, only her separate estate is liable.<sup>24</sup>

In Delaware the subject remains nearly as at common law, and a married woman may be executrix, and either she, or her husband in her right, may administer. Both, however, must join in the administration bond, and it binds her notwithstanding her coverture, though probably her personal liability would be limited to her separate estate.<sup>25</sup> In Illinois, if a married woman is appointed executrix, her husband may give bond for her.<sup>26</sup> In Maryland no married woman can be executrix unless her husband gives bond for the

<sup>20</sup> Cal. Code Civ. Proc. §§ 1352, 1370; *Teschemacher v. Thompson*, 18 Cal. 20.

<sup>21</sup> *Cosgrove v. Pitman*, 37 Pac. 232, 103 Cal. 268; *Schroeder v. Superior Court*, 11 Pac. 651, 70 Cal. 343.

<sup>22</sup> St. 1882-83, No. 327, p. 100.

<sup>23</sup> See *Leverett v. Dismukes*, 10 Ga. 98; *Fields v. Carlton*, 11 S. E. 124, 84 Ga. 597.

<sup>24</sup> Conn. Acts 1882, c. 62.

<sup>25</sup> Del. Rev. Code 1874, c. 89, §§ 5, 14.

<sup>26</sup> Ill. Rev. St. 1883, c. 3, § 3.

faithful performance of her duties, but otherwise a married woman is competent for either office.<sup>27</sup>

In New York, until the act of 1867, the written consent of the husband was necessary.<sup>28</sup> But by the later statute a married woman may act in either office as if sole.<sup>29</sup> In Massachusetts a married woman may be executrix or administratrix,<sup>30</sup> and as a married woman is capable of making a valid contract, and may sue and be sued alone, there seems to be no reason why he should join in her bond.<sup>31</sup>

At common law, the marriage of a feme sole, who had been appointed executrix or administratrix, had no further effect than that her husband became entitled to direct the administration as if she had been married when she received the appointment, as was stated in the black-letter text above.<sup>32</sup> But by statute in many of the United States,—mostly in states where the disabilities of married women remain as at common law,—it is provided that if a feme sole is appointed executrix or administratrix, and then marries, the marriage extinguishes her authority, and if she is the sole incumbent of the office there should be an administrator de bonis non appointed.<sup>33</sup>

Except when this statutory change is made, the rules of the common law apply, and the husband marrying the executrix or administratrix becomes joined in the office, with all the rights and privileges, and jointly liable.<sup>34</sup> And in New Jersey it is held that letters of administration, if granted at all to a married woman,

<sup>27</sup> Md. Rev. Code 1878, art. 50, §§ 66, 74; *Binnerman v. Weaver*, 8 Md. 523.

<sup>28</sup> N. Y. Rev. St. (5th Ed.) pt. 2, c. 6, tit. 2, art. 1, §§ 3, 32.

<sup>29</sup> Acts 1867, c. 782, § 2; *In re Curser*, 25 Hun, 579; *West v. Mapes*, 4 Redf. Sur. (N. Y.) 496.

<sup>30</sup> Mass. Pub. St. c. 147, § 5.

<sup>31</sup> Mass. Pub. St. c. 147, §§ 2, 7.

<sup>32</sup> Went. Off. Ex'r, 379.

<sup>33</sup> Cal. Code Civ. Proc. §§ 1352, 1370; Ohio Rev. St. 1880, § 6022; R. I. Pub. St. c. 184, §§ 19, 20; Vt. Gen. St. 1870, c. 50, §§ 8, 12; *Field v. Torrey*, 7 Vt. 372; *Tribble's Ex'rs v. Broadus* (Ky.) 23 S. W. 349.

<sup>34</sup> *Woodruff v. Cox*, 2 Bradf. (N. Y.) 153; *Kavanaugh v. Thompson*, 16 Ala. 817; *Wood v. Chetwood*, 27 N. J. Eq. 311; *Barber v. Bush*, 7 Mass. 510; *Swau v. Wilkinson*, 14 Mass. 295.

should be granted to her in conjunction with her husband.<sup>35</sup> And in that state the statute provides that, if an executrix or administratrix marries, her powers cease, and she shall be removed from office, unless her husband joins her in a bond, with at least two good sureties, for her faithful performance of the duties of her office.<sup>36</sup>

It has been held in Alabama that she may resign the office without his consent,<sup>37</sup> and after his death she becomes sole administratrix again.<sup>38</sup> In Massachusetts an early statute provided that if a feme sole, who was joint executrix or administratrix, married, her authority was extinguished.<sup>39</sup> But, as this statute had no effect upon the common-law rule when the feme sole was sole executrix or administratrix,<sup>40</sup> a later statute of similar import was enacted to cover the latter case.<sup>41</sup> At the present time, under the statute allowing a married woman to be executrix or administratrix, these statutes are superseded.<sup>42</sup>

#### IDIOTS, LUNATICS, AND INSANE PERSONS ARE INCOMPETENT.

**46. As the administration of estates demands intelligence, it has always been held by the common law, as well as the civil law, that idiots, lunatics, and insane persons are incapable of being executors or administrators, and this rule has been enacted by statute in many of the United States, either in express words, or in the modified form that one who**

<sup>35</sup> *Cramer v. Sharp*, 24 Atl. 962, 49 N. J. Eq. 558. But disqualification of the executor does not disqualify his wife. *Lippincott v. Wikoff* (N. J. Ch.) 33 Atl. 305.

<sup>36</sup> *Id.*

<sup>37</sup> *Rambo v. Wyatt's Adm'r*, 32 Ala. 363.

<sup>38</sup> *Pistole v. Street*, 5 Port. (Ala.) 64.

<sup>39</sup> St. 1783, c. 24, § 19; *Newell v. Marcy*, 17 Mass. 341.

<sup>40</sup> *Swan v. Wilkinson*, 14 Mass. 295.

<sup>41</sup> Gen. St. c. 101, § 4.

<sup>42</sup> Mass. Pub. St. c. 147, § 5.

is adjudged by the probate court to be incompetent for want of understanding is disqualified for such office.

The rule that idiots, lunatics, and insane persons are disqualified for the office of either executor or administrator is affirmed by all the best writers.<sup>43</sup> It has been enacted by statute in many of the United States, and as the principle existed at common law, and is evidently based upon the necessities of the case, it is undoubtedly the law, even in those states where there is no statute upon the subject, that the judge of probate may refuse to appoint one as executor or administrator whose mental weakness is such as to unfit him, in the judgment of the court, for those offices.<sup>44</sup> Both under such statutes and at common law the probate judge decides whether the applicant is suitable for the trust, and it is not necessary that he should find that the applicant is an idiot or lunatic, in the strict sense of the term, but that he is mentally unsuitable for the office.<sup>45</sup> Whether, in such a case, the appointment should go to the person next entitled to the office, or whether it should go to the guardian of the insane person, for his benefit, does not seem to be uniformly settled. If the insane person is one of a class all equally entitled, undoubtedly the court would appoint some other of the class. If the insane person is the only one entitled, it has been held that the court will grant letters to his guardian in preference to the next of kin or any person nominated by them.<sup>46</sup> And in some states such a course is directed by express statute.<sup>47</sup> But, in states where the statute gives the judge the right of rejecting applicants if they are not of suitable intelligence, it would

<sup>43</sup> Godol. pt. 2, c. 6, § 2; Bac. Abr. "Executors," A, 5; Williams, Ex'rs, 278.

<sup>44</sup> Thayer v. Homer, 11 Metc. (Mass.) 104, 110; Sill v. M'Knight, 7 Watts & S. (Pa.) 244, 245; Goods of Williams, 3 Hagg. Ecc. 217; Goods of Dunn, 5 Notes Cas. 97.

<sup>45</sup> Thayer v. Homer, 11 Metc. (Mass.) 104, 110. And, as to what constitutes such unfitness, see, further, Shilton's Estate, 1 Tuck. (N. Y.) 73; McGregor v. McGregor, \*40 N. Y. 133.

<sup>46</sup> Mowry v. Latham, 23 Atl. 13, 17 R. I. 480. As to choice from a class, see ante, p. 81, c. 5.

<sup>47</sup> McLaughlin's Estate, 37 Pac. 410, 103 Cal. 429.

seem that he might appoint the next person entitled in order of succession.

*Inability to Read or Write.*

It has been sometimes urged upon the court that in view of the accounting, and other duties of an executor or administrator, inability to read or write constitutes such a want of understanding as disqualifies the applicant for such offices; but it has generally been held that such inability does not, in absence of express statute, actually disqualify the applicant.<sup>48</sup> And the same has been held where the applicant, in addition, was unable to talk English, but could speak Spanish, which language was well enough understood in the locality to allow of the transaction of business.<sup>49</sup> It was also so held where he could not write, and could only read German; he having good sense, a knowledge of the values of property, and of the practical business transactions of life.<sup>50</sup>

But in New York it is now provided by statute that such inability to read and write will justify the court, in its discretion, in refusing to appoint the applicant.<sup>51</sup> And under this statute the surrogate's office has established a rule to refuse the applications for letters testamentary or of administration of persons who are unable to read and write, except under special circumstances, on account of the great liability of confusion arising in the account of such persons.<sup>52</sup>

*Drunkenness—Improvidence.*

Closely allied to the disability as to lack of intellectual capacity are those statutory provisions that one who is adjudged by the probate court incompetent by reason of drunkenness or improvidence shall not be appointed executor or administrator.<sup>53</sup> Neither of

<sup>48</sup> Nusz v. Grove, 27 Md. 391, 401; Gregg v. Wilson, 24 Ind. 227; Pacheco's Estate, 23 Cal. 476; Wilkey's Appeal, 108 Pa. St. 567.

<sup>49</sup> Pacheco's Estate, 23 Cal. 476.

<sup>50</sup> Bowersox's Appeal, 100 Pa. St. 434. To the same effect, see Li Po Tai's Estate, 41 Pac. 486, 108 Cal. 484.

<sup>51</sup> Laws 1867, c. 782, § 5.

<sup>52</sup> In re Hahlin's Estate, 53 How. Prac. (N. Y.) 504.

<sup>53</sup> Ala. Code, § 2340; Cal. Code Civ. Proc. §§ 1350, 1369; Ind. Rev. St. §§ 2222, 2230; N. Y. Rev. St. (5th Ed.) pt. 2, c. 6, tit. 2, art. 1, § 3; Id., art. 2, § 32; Sill v. M'Knight, 7 Watts & S. (Pa.) 244, 245.

these disabilities existed at common law, and they would not be regarded as strictly disqualifying the applicant in any state where it is not expressly so enacted. The improvidence which the framers of such statutes generally have in contemplation has been said to be that want of care and foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost or diminished in value by improvidence, in case administration should be committed to the applicant. The principle of this disqualification is that a man who is wanting in ordinary care and forecast in the acquisition and preservation of property for himself cannot with safety be intrusted with the management and preservation of the property of others.<sup>54</sup>

This improvidence has no regard to mere moral delinquencies; and it has been held that the applicant may be shown to be of degraded moral character, or to have been guilty of breaches of trust, or to have been insolvent, and yet not be regarded as incompetent under this term of "improvidence."<sup>55</sup> The term refers to habits of mind and conduct, which become a part of the man, and render him generally, and under all ordinary circumstances, unfit for the trust or employment in question.<sup>56</sup> The fact that a man, at the advanced age of 61, is not possessed of property of any considerable value, has no tendency to show improvidence; nor the fact that he has not for a considerable time supported his wife, from whom he has been separated during that time.<sup>57</sup> The fact that a man is a professional gambler is *prima facie* evidence of such improvidence;<sup>58</sup> and the fact that he is an habitual drunkard, is generally under the influence of liquor, and has often had delirium tremens, is sufficient to exclude him from the office of executor,<sup>59</sup> or to justify his removal by the probate court.<sup>60</sup> But drunkenness should

<sup>54</sup> *Coope v. Lowerre*, 1 Barb. Ch. (N. Y.) 47, 48.

<sup>55</sup> *Emerson v. Bowers*, 14 N. Y. 452, 455; *Coope v. Lowerre*, 1 Barb. Ch. (N. Y.) 47, 48.

<sup>56</sup> *Emerson v. Bowers*, 14 N. Y. 454.

<sup>57</sup> *Davis' Estate* (Mont.) 25 Pac. 105.

<sup>58</sup> *McMahon v. Harrison*, 6 N. Y. 443. Cf. *Coggshall v. Green*, 9 Hun (N. Y.) 471.

<sup>59</sup> *In re Cady's Estate*, 36 Hun (N. Y.) 126.

<sup>60</sup> *Sill v. McKnight*, 7 Watts & S. (Pa.) 244.

be such as amounts to habitual drunkenness.<sup>61</sup> On this point the language of the court in an important case in Montana is very accurate: "This question does not turn upon the fact that the applicant is shown to be in the habit of using intoxicating liquors to some extent. However reprehensible that habit may be from a moral point of view, it is not within the province of the court to deny letters of administration to an applicant on the ground of mere use of intoxicants. The drunkenness contemplated by the statute is undoubtedly that excessive, inveterate, and continued use of intoxicants, to such an extent as to render the subject of the habit an unsafe agent to intrust with the care of property or the transaction of business. It is a matter of common knowledge that the appetite for intoxicating liquors takes such a strong hold upon some individuals as to become a controlling influence. This appetite strengthens by indulgence. The will force becomes too feeble to resist the craving of the appetite; indulgence is unrestricted, constant, and excessive. A person so controlled by such an appetite may be said to be abandoned to the habit of drunkenness. The unfortunate effect of this habit is to render the subject of it not only physically and mentally incompetent to transact business of importance, and preserve property with due care, but usually the subject of this habit becomes indifferent to the most sacred duties, and careless of demands of the highest moment. Such a person may well be adjudged incompetent to execute the duties of the trust involved in the administration of an estate."<sup>62</sup> The fact that the applicant carries on an important business of his own, and attends to business affairs of moment for others, and has the reputation of being a shrewd business man, is sufficient to show his competence for appointment.<sup>63</sup> And now, by statute in New York, dishonesty is made an additional disqualification for the office of executor or administrator.<sup>64</sup> But a lack of honesty, integrity, and business experience has been held in Connecticut not to be a disqualification to the office of executor, in the absence of express stat-

<sup>61</sup> *Manley's Estate*, 34 N. Y. Supp. 258, 12 Misc. Rep. 472.

<sup>62</sup> *Root v. Davis*, 25 Pac. 105, 10 Mont. 228. See, also, *In re Connors' Estate*, 42 Pac. 906, 110 Cal. 408.

<sup>63</sup> *Id.*

<sup>64</sup> *Laws 1873*, p. 159, c. 79.

ute; for the testator must be presumed to have known the character of the person whom he appointed as executor, and the right gained by this appointment is not lost, unless by absolute disqualification.<sup>65</sup> But by statute in many states a want of integrity renders both an executor and an administrator incompetent.<sup>66</sup> Merely claiming as his own property which others interested in the estate claim to form part of the estate does not show a lack of integrity, if the claim is honestly made and with reasonable ground.<sup>67</sup> And, to recapitulate, it may be said that drunkenness, improvidence, and want of understanding do not disqualify, unless by express statutory authority, but may influence the discretion of the court in case of a choice among several of a class.

#### POVERTY AND INSOLVENCY—HOW FAR A DISQUALIFICATION.

**47. Poverty and insolvency are not disqualifications for the office of executor, unless by express statute; but insolvency is a disqualification for the office of administrator, though poverty is not, unless by statute.**

At common law the poverty or insolvency of one named in the will as executor did not disqualify him from acting in that capacity, as the testator was supposed to know the circumstances of one to whom he intrusted such an important office.<sup>68</sup> But a court of chancery would interfere to restrain an insolvent or bankrupt executor from acting, and would appoint a receiver,<sup>69</sup> and bankruptcy was at all times a disqualification for the office of administrator.<sup>70</sup>

In the United States the system of requiring bonds from both executors and administrators renders the estate more secure than it would otherwise be under the management of insolvent executors

<sup>65</sup> Smith's Appeal, 24 Atl. 273, 61 Conn. 420.

<sup>66</sup> Root v. Davis, 25 Pac. 105, 10 Mont. 228; Bauquier's Estate, 26 Pac. 178, 532, 88 Cal. 302.

<sup>67</sup> Bauquier's Estate, *supra*.

<sup>68</sup> Williams, Ex'rs, 275.

<sup>69</sup> Utterson v. Mair, 2 Ves. Jr. 95; Scott v. Becher, 4 Price, 346.

<sup>70</sup> Hills v. Mills, 1 Salk. 36; Williams, Ex'rs, 515.



and administrators, but it seems to be the better opinion that those who are interested in the estate are entitled to the security afforded by the personal responsibility of the executor or administrator, as well as that which the bond affords, and therefore that the insolvency or bankruptcy of an applicant for appointment either as executor or administrator is a bar to his appointment, without express statutory enactment, even though he has good bondsmen.<sup>71</sup> At the same time, the mere poverty of the applicant can hardly be considered to disqualify him for the office;<sup>72</sup> nor the fact that he is a man of inconsiderable means, not transacting business or having any place of business.<sup>73</sup> The discretion of the court, in choosing among a class, would undoubtedly be influenced by the pecuniary ability of the applicants, among other considerations.

#### CONVICTS—HOW FAR DISQUALIFIED.

**48. In many states persons who have been convicted of an infamous crime are declared by statute incompetent to be either executors or administrators.**

It has been held that the conviction intended by the statute must be upon an indictment or other criminal proceeding, and that no degree of legal or moral guilt or delinquency is sufficient to exclude a person from the administration as the next of kin, as a convict or criminal, in case of a preference given by the statute, unless he has been actually convicted of an infamous crime.<sup>74</sup> And it is accordingly held that a judgment against one for criminal connection with a married woman does not disqualify him for the office of executor or administrator.<sup>75</sup> It is also held in the same state that the conviction must be a conviction within the state, in or-

<sup>71</sup> *Levan's Appeal*, 3 Atl. 804, 112 Pa. St. 298; *McArthur's Estate*, 26 Pittsb. Leg. J. 57; *Cornprobst's Appeal*, 33 Pa. St. 537. But see *Lynch v. Lively*, 32 Ga. 575.

<sup>72</sup> *Wilkins v. Harris*, 1 Winst. Eq. (N. C.) 41; *Shields v. Shields*, 60 Barb. (N. Y.) 56; *Bowersox's Appeal*, 100 Pa. St. 434; *Lynch v. Lively*, 32 Ga. 575.

<sup>73</sup> *Postley v. Cheyne*, 4 Dem. Sur. (N. Y.) 492, 494. As to choice among a class, see, ante p. 81, c. 5.

<sup>74</sup> *Coope v. Lowerre*, 1 Barb. Ch. (N. Y.) 47.

<sup>75</sup> *Coope v. Lowerre*, supra.

der to work ipso facto a disqualification for the office.<sup>76</sup> These statutes are to be strictly construed, since, if the court declares one who has the right to administration incompetent, it thereby deprives him of a right.<sup>77</sup>

This disability arising from conviction of an infamous crime is an innovation, in some respects, upon the common law as administered in England. By that law, none were disqualified for the office of executor, although convicted of felony, or attainted or outlawed.<sup>78</sup> But, by the civil and canon law, traitors, felons, heretics, apostates, usurers, famous libelers, incestuous bastards, and many others, were incapable of being executors.<sup>79</sup> And even at common law the disabilities for the office of administrator comprised attainder of treason and felony.<sup>80</sup>

In those of the United States where no statute exists upon this subject, it is probably the law that conviction of an infamous crime would render a person incompetent to become either an executor or administrator, absolutely, as well as in cases where a discretion is given to the court in the matter.

#### ALIENAGE, NONRESIDENCE—HOW FAR A DISQUALIFICATION.

49. Alienage was not at common law a disqualification for the office of either executor or administrator, even though the executor was an alien enemy residing in the king's dominions.<sup>81</sup>

50. In many of the United States, however, it is provided by statute, or established by decisions, that one who is not a resident of the state cannot be either executor or administrator, since those interested in the estate are entitled to the security afforded by the

<sup>76</sup> O'Brien v. Neubert, 3 Dem. Sur. (N. Y.) 156.

<sup>77</sup> Coope v. Lowerre, 1 Barb. Ch. (N. Y.) 47.

<sup>78</sup> Hix v. Harrison, 3 Bulst. 210; Co. Litt. 128a; Williams, Ex'rs, 274.

<sup>79</sup> Swinb. Wills, pt. 5, §§ 2-4, 7, 9, 10.

<sup>80</sup> Hensloe's Case, 9 Coke, 39b; Williams, Ex'rs, 515.

<sup>81</sup> Godol. pt. 2, c. 6, § 1; Com. Dig. "Administrators," B, 6; Williams, Ex'rs, 269, 270; Bradley v. Harden, 73 Ala. 70.

residence of the executor or administrator in the state, and the situs of the personal property within reach of the process of the courts of the state.

In states where no statutory provisions exist on this subject, the common-law rule prevails, and nonresidents may be executors or administrators.<sup>82</sup>

Such statutes mark pointedly the difference between the office of executor or administrator at the present time, when it is merely a means of distributing the estate, from the old theory, by which the executor or administrator was the owner of the estate, subject only to the burden of paying debts.<sup>83</sup> In Georgia, citizens only may be executors, but a citizen of any one of the United States may be executor of a citizen of Georgia, if he has the interest in the estate and gives bonds as required in that state of administrators;<sup>84</sup> and citizens only may be administrators, except that a citizen of another of the United States, having an equal, greater, or sole interest in the estate of a citizen of Georgia, may, by giving bonds with resident sureties, be made competent to act as administrator. These sureties are liable in suit on the bond without joining the administrator.<sup>85</sup> In Illinois and Kentucky nonresidents cannot be administrators.<sup>86</sup> In Iowa nonresidence in the state is only a fact which may be taken into account by the probate court, and not an absolute ground of incompetence, and, if for other reasons the appointment of a nonresident is desirable, it will be made.<sup>87</sup> In Maryland

<sup>82</sup> *Cutler v. Howard*, 9 Wis. 309; *Ex parte Barker*, 2 Leigh (Va.) 719; *Jones v. Jones*, 12 Rich. Law (S. C.) 623; *Smith v. Munroe*, 1 Ired. (N. C.) 345.

<sup>83</sup> *In re Cotter's Estate*, 54 Cal. 215; *In re Dorris' Estate*, 29 Pac. 244, 93 Cal. 611; *In re Beech*, 63 Cal. 458; *In re Hyde's Estate*, 30 Pac. 804, 64 Cal. 228; *Pickering v. Pentdexter*, 46 N. H. 69; *Public Adm'r v. Watts*, 1 Paige (N. Y.) 347; *Wickwire v. Chapman*, 15 Barb. (N. Y.) 302; *Sarkie's Appeal*, 2 Pa. St. 157; *Colvin's Appeal*, 25 Pittsb. Leg. J. 101; *Sharpe's Appeal*, 87 Pa. St. 165; *McCreary v. Taylor*, 38 Ark. 393; *Bowersox's Appeal*, 100 Pa. St. 434; *Lynch v. Lively*, 32 Ga. 575.

<sup>84</sup> Ga. Code, §§ 2434, 2439.

<sup>85</sup> Ga. Code, § 2493; *Maybin v. Knighton*, 67 Ga. 103.

<sup>86</sup> Ill. Rev. St. (Coth.) c. 3, § 18; *Childs v. Gratiot*, 41 Ill. 357; *Radford v. Radford*, 5 Dana (Ky.) 156. Cf. *Rosenthal v. Renick*, 44 Ill. 207.

<sup>87</sup> *O'Brien's Estate*, 19 N. W. 797, 63 Iowa, 622; *Chicago, B. & Q. R. Co. v. Gould*, 20 N. W. 464, 64 Iowa, 343.

a person who is not a citizen of the United States is incompetent for either office,<sup>88</sup> but mere nonresidence in the state does not disqualify. Nonresidents, however, entitled to administration, are not entitled to notice of the application of others for administration, and consequently, if they fail to assert their right to administration within the time limited by statute, they lose it altogether.<sup>89</sup> In Michigan and Vermont no provisions of statute touch the point, except that, if executors or administrators reside out of the state, they may be removed from office, from which it would seem that they are incompetent to be originally appointed.<sup>90</sup> In New York aliens not inhabiting the state are incompetent for either office.<sup>91</sup> Under this statute citizens of the United States are competent to be executors or administrators, although residents of other states.<sup>92</sup> But it has been held that a citizen of the United States residing in another state should be passed over, in favor of a resident of New York state, although not so near in kin;<sup>93</sup> also, that security should be taken from a nonresident executor<sup>94</sup> unless he has an office within the state for the regular transaction of business in person.<sup>95</sup> In Rhode Island no person not an inhabitant of the state should be appointed administrator unless the court, from other circumstances, thinks it proper.<sup>96</sup>

In states where no statutory provisions exist on this subject, the common-law rule prevails, and nonresidents may be executors or administrators.<sup>97</sup> In some states, however, where nonresidents are competent, it is provided that they shall appoint agents resident in the state, upon whom service of process may be made with

<sup>88</sup> Md. Rev. Code 1878, art. 50, §§ 60, 74.

<sup>89</sup> Ehlen v. Ehlen, 1 Atl. 880, 64 Md. 362.

<sup>90</sup> How. Ann. St. §§ 5842, 5858; Vt. Gen. St. c. 50, § 9; Id., c. 51, § 12.

<sup>91</sup> N. Y. Rev. St. (5th Ed.) pt. 2, c. 6, tit. 2, art. 1, § 3; Id., art. 2, § 32; Sutton v. Public Adm'r, 4 Dem. Sur. (N. Y.) 33.

<sup>92</sup> McGregor v. McGregor, 3 Abb. Dec. (N. Y.) 92; Demarest's Estate, 1 Civ. Proc. R. (N. Y.) 302; Robinson v. Navigation Co., 19 N. E. 625, 112 N. Y. 315.

<sup>93</sup> Wickwire v. Chapman, 15 Barb. (N. Y.) 302.

<sup>94</sup> Bartlett's Estate, 1 Month. Law Bul. 24. Cf. ante, p. 81, c. 5.

<sup>95</sup> Postley v. Cheyne, 4 Dem. Sur. (N. Y.) 492. Cf. post, p. 182, c. 12.

<sup>96</sup> R. I. Pub. St. c. 184, § 6.

<sup>97</sup> Cutler v. Howard, 9 Wis. 309; Ex parte Barker, 2 Leigh (Va.) 719; Jones v. Jones, 12 Rich. Law (S. C.) 623; Smith v. Munroe, 1 Ired. (N. C.) 345.

the same effect as if upon the principals.<sup>98</sup> In Alabama nonresidents may be appointed executors or administrators on giving bond, and, if the will was probated in another state, on filing a copy of the will, and a certificate of the judge of probate that the will is duly probated, and a copy of the bond. In such case notices of claims against the estate are to be sent by mail to the name and address given in the application for appointment, and also a copy must be given to the sureties.<sup>99</sup> In Connecticut, claims, notices, etc., against nonresident executors or administrators must be left with the judge of probate before whom the estate is being settled.<sup>100</sup> In some states statutes provide that, if a person appointed executor or administrator remove out of the state, he loses his right to the office, and should be removed. It is held that these statutes do not affect the grant of ancillary letters in the state to one who has been duly appointed and qualified in another state.<sup>101</sup>

In California, where the statute provides that if a person absent from the state is named as executor, if there is no other executor, letters of administration cum testamento annexo must be granted, it is held that a nonresident named as executor in the will may receive letters, and need not be in the state at the exact time of issuing of letters.<sup>102</sup>

#### RELIGIOUS BELIEF—HOW FAR A DISQUALIFICATION.

##### 51. No form of religious belief disqualifies either an executor or an administrator for the duties of the office.

In England certain disqualifications existed at one time on account of religious belief. Thus, a popish recusant, convicted at the death of the testator, was incompetent to be executor.<sup>103</sup> But now Roman Catholics are exempt in that country from those disabilities.<sup>104</sup> And in the United States these disabilities never existed.

In an early case in Maryland a Catholic nun was held competent

<sup>98</sup> Mass. Pub. St. c. 132, § 8; Me. Rev. St. 1883, c. 64, § 41.

<sup>99</sup> Ala. Code, 1876, §§ 2379-2384; Laws 1878-79, No. 51.

<sup>100</sup> Conn. Acts, 1878, c. 10; Acts 1882, c. 32.

<sup>101</sup> Corrigan v. Jones, 23 Pac. 913, 14 Colo. 311. Cf. p. 154, c. 10.

<sup>102</sup> In re Brown's Estate, 22 Pac. 233, 80 Cal. 381.

<sup>103</sup> St. 3 Jac. I. c. 5, § 22. See, also, St. 3 Car. I. c. 2, § 1.

<sup>104</sup> St. 31 Geo. III. c. 32; Williams, Ex'rs, 277.

to be executrix,<sup>105</sup> the court saying that not by vows of any description could the parties making them exempt themselves from any of the duties which the state might require of them, or forfeit any of the rights which would have belonged to them but for the vows, and, as to those vows interfering with the administration of the estate, that was a matter for the applicant alone to judge of, not the court, and that the bond required of administrators was a sufficient security for the proper administration of the estate.

#### **SURVIVING PARTNERS SOMETIMES DISQUALIFIED.**

**52. In many of the United States, provision is made by statute that a surviving partner is incompetent to be administrator of the estate of his deceased partner if the partnership existed at the death of the intestate.**

This disqualification was not known to the ecclesiastical or common law, but is entirely a creation of statute.<sup>106</sup> It is a valuable restriction, and it has been said, in a state where no such statute exists, to be a desirable thing that a partner should not be administrator of his deceased partner's estate, but that till the legislature enacts such a rule the courts can only enforce a strict accountability.<sup>107</sup> In Maine, however, the difficulty is obviated by allowing the surviving partner to settle the partnership estate separately from the general administration, which is intrusted to the next of kin.<sup>108</sup>

#### **CORPORATIONS—HOW FAR COMPETENT.**

**53. Corporations sole have always been capable of acting as executors or administrators. As to corporations aggregate, it has been considered doubtful at common law whether they were competent for either office. But they are made competent by statutes in some of the United States.**

<sup>105</sup> *Smith v. Young*, 5 Gill (Md.) 197.

<sup>106</sup> *Cornell v. Gallaher*, 16 Cal. 367; *Heward v. Slagle*, 52 Ill. 336.

<sup>107</sup> *Brown's Estate*, 11 Phila. 127.

<sup>108</sup> *Cook v. Lewis*, 36 Me. 340.

There seems never to have been any doubt that a corporation sole might be either executor or administrator.<sup>109</sup> In fact, the clergy, who formed the majority of such corporations, were doubtless favored by the ecclesiastical courts for such purposes. But corporations aggregate were generally considered to be unfitted by their nature to undertake the duties of the office. The reason for this disqualification has been said to be the rather technical one that they could not take the oath of office.<sup>110</sup>

Mr. Williams, however, states it to be now settled in England that such corporations, if appointed executors, may appoint persons styled "syndics" to receive administration with the will annexed.<sup>111</sup>

In the United States the question has not often arisen, but it has been said that the English practice of appointing syndics has never been adopted here, and that corporations aggregate cannot, in absence of statutory authority, be executors or administrators.<sup>112</sup> In a case in New Jersey the query was raised but not settled,<sup>113</sup> although in a previous case administration with the will annexed was granted to one member of a corporation, on its request and appointment; it being the residuary legatee under the will, and as such entitled to administer.<sup>114</sup> In some of the states the acts of incorporation or charters of trust companies and similar institutions give them the right to act as executors or administrators, and they are then competent, and will be preferred to the public administrator, if they are duly chosen by the next of kin to act in that capacity.<sup>115</sup>

<sup>109</sup> Godol. pt. 2, c. 6; Went. Off. Ex'r, 39; Goods of Haynes, 3 Curt. Ecc. 75; In re Kirkpatrick's Will, 22 N. J. Eq. 467.

<sup>110</sup> Williams, Ex'rs, 268; 1 Bl. Comm. 477; Com. Dig. "Administrators," B, 2.

<sup>111</sup> Williams, Ex'rs, 268, 269; Toller, Ex'rs, 30, 31.

<sup>112</sup> President, etc., of Georgetown College v. Browne, 34 Md. 455; In re Thompson's Estate, 33 Barb. 334.

<sup>113</sup> Porter v. Trall, 30 N. J. Eq. 106.

<sup>114</sup> In re Kirkpatrick's Will, 22 N. J. Eq. 463.

<sup>115</sup> Goddard v. Abbott, 30 Hun, 401; Fidelity Insurance, Trust & Safe-Deposit Co. v. Niven, 5 Houst. (Del.) 416. Compare post, p. 136, c. 9.

**ABSOLUTE AND DISCRETIONARY INCOMPETENCY.**

54. There is a distinction between the various disqualifications heretofore enumerated, which divides them substantially into two classes,—absolute disqualifications and discretionary disqualifications.

The absolute disqualifications are such as are enacted by statute as a total bar to the appointment of the person affected by them. Such statutes are mandatory upon the judge of probate, and he cannot appoint the person so barred. The discretionary disqualifications are those disqualifications which are addressed to the discretion of the judge of probate, as tending to induce him not to appoint the person affected by them.

Thus, if the judge of probate in California finds that an applicant for appointment as administrator is not a resident of that state, he is obliged to refuse the appointment.<sup>116</sup> But the disabilities arising from want of mental capacity, or from the character of the applicant, are in some measure left to the discretion of the judge of probate, who, in order to refuse such an applicant, must find that the mental capacity or character of the applicant are such as to render him an improper person for the position. Such disqualifications may be termed discretionary disqualifications, and of them the principal are drunkenness, improvidence, and want of understanding.<sup>117</sup> Yet the discretion of the court is limited, since these disabilities have been interpreted by decision, and this interpretation must be observed by the court in the exercise of its discretion, since the effect of declining an applicant is to deprive him of a right to which he is by law entitled.<sup>118</sup>

A more extended discretion arises when the statute provides in general terms that the applicant shall be competent, or shall be

<sup>116</sup> See *supra*, note, 102.

<sup>117</sup> *Ante*, p. 103. By statute, in Iowa, nonresidence in the state is a discretionary disability. *Estate of O'Brien*, 19 N. W. 797, 63 Iowa, 622; *Chicago, B. & Q. Ry. Co. v. Gould*, 20 N. W. 464, 64 Iowa, 343. And in New York, inability to read and write English. *Laws 1867*, c. 782, § 5.

<sup>118</sup> *Coope v. Lowerre*, 1 Barb. Ch. (N. Y.) 46; *Morgan's Estate*, 2 How. Prac. N. S. (N. Y.) 194.



suitable or proper, or where a class are all competent. In such cases the discretion of the judge of probate seems to be very widely extended, and he may refuse to appoint one who has an undoubted right to the appointment, merely because he does not seem suitable to the judge.<sup>119</sup>

*Miscellaneous Decisions on Incompetency.*

The mere fact that an applicant for letters is not of kin to the deceased is not a ground of incompetency in proper cases for such appointment,—for instance, when the case arises in states where nomination by those entitled to administer is permitted, or where all others have refused or are incompetent; but in most states such careful provision for priority is made that there is no opportunity for such a question to arise.<sup>120</sup> Illegitimacy is not a ground of incompetency in an applicant for either letters testamentary or of administration, although, of course, it is a bar to any claim of right to administration, and places the applicant in the position of a stranger to the estate.<sup>121</sup> Nor do old age or bodily infirmities of themselves disqualify for the office of executor or administrator.<sup>122</sup> In those states where the competency of the applicant is left wholly to the discretion of the judge of probate, a widow who is proved to be under the influence of a debtor of the estate will be denied the office if the creditor's claims would be endangered by her appointment.<sup>123</sup>

The fact that one who applies is a debtor of the estate is not considered to be an absolute disqualification, if he is a responsible party, can give good bond, and has the confidence of those interested in the estate.<sup>124</sup> Of course, the fact that one who applies is a creditor of the estate has no disqualifying force, as it is a recognized ground of title for letters.<sup>125</sup>

<sup>119</sup> Cf. ante, pp. 63, 70, c. 5; Id. p. 5, c. 6.

<sup>120</sup> In re Kirtlan's Estate, 16 Cal. 161.

<sup>121</sup> In re Pico's Estate, 56 Cal. 413. Cf. ante, p. 75, c. 5.

<sup>122</sup> In re Berrien, 3 Dem. Sur. (N. Y.) 263.

<sup>123</sup> Stearns v. Fiske, 18 Pick. (Mass.) 24.

<sup>124</sup> Succession of Weis, 9 South. 95, 43 La. Ann. 475. Cf. ante, p. 80, c. 5.

<sup>125</sup> Bowen v. Stewart, 26 N. E. 168, 28 N. E. 73, and 128 Ind. 507. Cf. ante, p. 82, c. 5.

## CHAPTER VII.

### ACCEPTANCE OR RENUNCIATION.

#### 55. Express and Implied Acceptance or Renunciation.

#### EXPRESS AND IMPLIED ACCEPTANCE OR RENUNCIATION.

55. The offices of both executor and administrator may be either claimed and accepted by the person or persons entitled to them, or may be renounced by them. If a person entitled to either office expressly renounces the right, or neglects to claim it after being duly cited into court for that purpose, or within the time limited by statute for claiming appointment, he forfeits the right.

An executor may expressly accept the office in writing, or by applying to the court for appointment, in accordance with the will. It is held in England that, in addition, he may so act that he is deemed to have accepted his office before he is cited into court. If he has taken possession of the goods of the deceased, or begun to administer them, or has done other acts which show an intention to accept, he is bound by these acts, and may be compelled to prove the will.<sup>1</sup> In the United States, however, it is not generally held that the executor is bound to accept the office for merely intermeddling with the estate, and it is said that a trusteeship, whether as executor or otherwise, cannot be imposed upon any party except by his own consent, or as a consequence of his own acts. Delay and inaction are generally treated as evidence of refusal, and cannot be held as evidence of acceptance. Even if a person named as executor, together with others, pays the funeral expenses, this does not amount to an acceptance of the trust.<sup>2</sup>

The person who is named as executor, or who has the right to ad-

<sup>1</sup> Wickenden v. Thomas, 2 Brownl. & G. 58; Hensloe's Case, 9 Coke, 37b; Van Horne v. Fonda, 5 Johns. Ch. (N. Y.) 388; Ambler v. Lindsay, 3 Ch. Div. 198; Davis v. Inscoe, 84 N. C. 402.

<sup>2</sup> In re Ralston's Estate, 28 Atl. 139, 158 Pa. St. 645.

ministration, may also expressly renounce or refuse to accept the office. It is law, by statute or decision, in some of the United States, that such renunciation or refusal, in order to bind the party making it, must be in writing filed in the probate court.<sup>3</sup> It is not, however, necessary that this writing should be formal. A letter or informal writing may be sufficient, if it indicates the refusal plainly, or if it expressly requests the appointment of another to the office.<sup>4</sup> In other states it is held that a refusal may be by act in pais, either verbal or written, and if one who is named as executor or has the right to administer unequivocally refuses to act, and another thereupon proceeds to claim the office, the refusal binds the party making it,<sup>5</sup> and he cannot afterwards withdraw it.<sup>6</sup> And so if he neglects for a long time to take any steps towards claiming the office.<sup>7</sup> And this is true although, by statute, a formal renunciation by writing filed in the probate court is provided for, unless the statute excludes it.<sup>8</sup> A written renunciation containing the nomination of a person to take the office renounced takes effect as a conditional renunciation only, and as a nomination of the person named.<sup>9</sup>

It has been held that filing a caveat against the probate of a will does not preclude the party filing it (he being the person named

<sup>3</sup> *Williams v. Neville*, 13 S. E. 240, 108 N. C. 559; *Went. Off. Ex'r*, 88; *Long v. Symes*, 3 Hagg. Ecc. 776; *Miller v. Meetch*, 8 Pa. St. 417; *Com. v. Mateer*, 16 Serg. & R. (Pa.) 416; *Newton v. Cocke*, 10 Eng. (Ark.) 169; *Muirhead v. Muirhead*, 6 Smedes & M. (Miss.) 451; *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33, 44. See *Abb. Desc., Wills & Adm.* § 112. A written agreement whereby a wife renounces all interest in her husband's estate is not a renunciation of her right to administer. *In re Wilson*, 36 N. Y. Supp. 882, 92 Hun, 318.

<sup>4</sup> *Broker v. Charter*, Cro. Eliz. 92; *Miller v. Meetch*, 8 Pa. St. 417; *Com. v. Mateer*, 16 Serg. & R. (Pa.) 416; *Carpenter v. Jones*, 44 Md. 625; *Stocksdale v. Conaway*, 14 Md. 99; *In re Kirtlan's Estate*, 16 Cal. 162.

<sup>5</sup> *Pollard v. Mohler*, 55 Md. 284; *Glenn v. Reid*, 24 Atl. 155, 74 Md. 238; *Ayres v. Weed*, 16 Conn. 296; *Solomon v. Wixon*, 27 Conn. 520; *In re Keane's Estate*, 56 Cal. 407; *Thornton v. Winston*, 4 Leigh (Va.) 152.

<sup>6</sup> *Lutz v. Mahan*, 30 Atl. 645, 80 Md. 233; *Glenn v. Reid*, 24 Atl. 155, 74 Md. 238.

<sup>7</sup> *Lawrence's Appeal*, 49 Conn. 411; *Lyle v. Siler*, 9 S. E. 491, 103 N. C. 261.

<sup>8</sup> *Carpenter v. Jones*, 44 Md. 625; *Stocksdale v. Conaway*, 14 Md. 99.

<sup>9</sup> *Williams v. Neville*, 13 S. E. 240, 108 N. C. 559.

in the will as executor) from accepting the trust.<sup>10</sup> An executor may renounce the office, even after he has taken the oath of office, if he has not intermeddled with the administration of the estate;<sup>11</sup> but not after propounding the will for probate, being appointed, and giving bond.<sup>12</sup> Such a withdrawal would be more properly a resignation.<sup>13</sup>

The office of executor or administrator may also be lost by failure to claim it after citation into court by others, or even, in some states, by lapse of time limited by the statute. A distinction exists between the statutes as to this form of renunciation, since in some states the mere lapse of the statutory time is enough to bar the prior right, and to devolve it upon the next class, without citation or actual renunciation by the former;<sup>14</sup> while in others the lapse of time merely gives the next class of applicants a right to claim administration, after citing those having a prior right into court, and compelling them either to take or refuse administration.<sup>15</sup> If lapse of time merely is necessary, and the one next in right has been appointed, it will be presumed that the necessary time to bar the prior right had duly elapsed, and the evidence allows such a presumption.<sup>16</sup>

The decisions are not uniform upon the question whether a renunciation may be withdrawn. In England and in some of the states it is held that an executor may withdraw his renunciation at any time before letters of administration de bonis non have been granted,<sup>17</sup> And it is held in New York that an administrator may

<sup>10</sup> *In re Maxwell*, 3 N. J. Eq. 611.

<sup>11</sup> *Miller v. Meetch*, 8 Pa. St. 417.

<sup>12</sup> *Sears v. Dillingham*, 12 Mass. 358.

<sup>13</sup> See post, p. 438, c. 21.

<sup>14</sup> *Edwards v. Bruce*, 8 Md. 387; *Lawrence's Appeal*, 49 Conn. 411; *Todhunter v. Stewart*, 39 Ohio St. 181; *Judd v. Ross*, 34 N. E. 631, 146 Ill. 40; *In re Miller*, 49 N. W. 427, 32 Neb. 480.

<sup>15</sup> *Williams v. Neville*, 13 S. E. 240, 108 N. C. 559; *Wheeler v. Stefler*, 33 Atl. 434, 82 Md. 648.

<sup>16</sup> *Judd v. Ross*, 34 N. E. 631, 146 Ill. 40. Cf., on conclusiveness of decree, ante, p. 19, c. 2.

<sup>17</sup> *McDonnell v. Prendergast*, 3 Hagg. Ecc. 212; *Robertson v. McGoech*, 11 Paige (N. Y.) 640; *Davis v. Inscoe*, 84 N. C. 401; *In re Gerstacker's Estate*, 57 Mo. App. 71.

do the same;<sup>18</sup> while in Maryland it is held that, after a renunciation of the right to administer is finally made, it cannot be retracted, even if it was made under a mistake as to its legal effect, but if made under a mistake of fact, as where the person signing a written renunciation was not aware what it was, the renunciation may be retracted.<sup>19</sup>

### *Effect of Renunciation.*

The effect of renunciation in the case of one appointed sole executor is that the office of executor is vacant, and letters of administration with the will annexed will be issued to the person entitled to them, and the same is true if all of several executors renounce;<sup>20</sup> while, if there are other executors who accept the office, the effect is simply to deprive the one who so refuses of his right to appointment as executor.<sup>21</sup> In the case of administrations, if all those entitled to appointment renounce or neglect to claim their right, the effect is to devolve the right upon those who are next entitled.<sup>22</sup> If only one of a class entitled to administer renounces, he merely bars his right.<sup>23</sup> If the renunciation is in favor of a nominee of the person renouncing, and a nomination is allowed by law, such a renunciation will bar the right of those persons next entitled to administration.<sup>24</sup>

If an executor renounce, he does not deprive himself of the right to be appointed administrator, if he is the person entitled to administration.<sup>25</sup> And if one named in the will as executor is appointed

<sup>18</sup> *Casey v. Gardiner*, 4 Bradf. Sur. (N. Y.) 13.

<sup>19</sup> *Carpenter v. Jones*, 44 Md. 625; *Thomas v. Knighton*, 23 Md. 327; *Glenn v. Reid*, 24 Atl. 155, 74 Md. 238; *Lutz v. Mahan*, 30 Atl. 645, 80 Md. 233. If one of a class entitled to administer renounces in favor of a stranger, and the others do not agree to it, the renunciation is void, and he may be appointed administrator. In *re Loeffler's Estate*, 8 Kulp, 199.

<sup>20</sup> *Broker v. Charter*, Cro. Eliz. 92; *Went. Off. Ex'r*, 95; *Hensloe's Case*, 9 Coke, 37a; *Thornton v. Winston*, 4 Leigh (Va.) 152.

<sup>21</sup> *Ayres v. Weed*, 16 Conn. 291; *Bennett v. Kiber*, 13 S. W. 220, 76 Tex. 385.

<sup>22</sup> See statutes and decisions ante, notes 14, 15.

<sup>23</sup> *Lutz v. Mahan*, 30 Atl. 645, 80 Md. 233. And, if he renounces in favor of a stranger, this renunciation is void unless all the others of this class agree to it. In *re Loeffler's Estate*, 8 Kulp, 199. Cf. ante, p. 92, c. 5.

<sup>24</sup> *Williams v. Neville*, 13 S. E. 240, 108 N. C. 559.

<sup>25</sup> *Briscoe v. Wickliffe*, 6 Dana (Ky.) 157.

administrator, and acts as such, he may afterwards take the executorship.<sup>26</sup>

*Contract to Renounce.*

The question has arisen in several cases whether a contract to renounce, for a valuable consideration, the office of executor or administrator, is a valid one. In Maryland it has been held that one who has such a right may sell it, and the contract is legal and will be enforced by the courts.<sup>27</sup> But in most states it is held that such a contract is illegal, because it would introduce so much uncertainty as to who would finally administer the estate, and a testator would feel no confidence that the person whom he had named as executor in his will would finally be the one to dispose of his estate.<sup>28</sup> Therefore the courts will leave the parties in the condition in which they have put themselves. If the contract remains wholly executory, the courts will not enforce it. If money has been paid, they will not assist in the recovery of it.

A contract to pay one a sum of money for acting as administrator is legal,<sup>29</sup> and so is a contract to act as administrator without making any charge for services.<sup>30</sup>

<sup>26</sup> Taylor v. Tibbatts, 13 B. Mon. (Ky.) 177.

<sup>27</sup> Brown v. Stewart, 4 Md. Ch. 368; Bassett v. Miller, 8 Md. 548. Cf. ante, p. 54, c. 4; Id. p. 92, c. 5; Id. p. 94, note 22, c. 6.

<sup>28</sup> Ellicott v. Chamberlin, 38 N. J. Eq. 604; Bowers v. Bowers, 26 Pa. St. 74; Owings' Ex'rs v. Owings, 1 Har. & G. (Md.) 484; Hargreaves v. Wood, 2 Swab. & T. 602.

<sup>29</sup> Clark v. Constantine, 3 Bush (Ky.) 652.

<sup>30</sup> M'Caw v. Blewit, 2 McCord, Eq. (S. C.) 90; Bate v. Bate, 11 Bush (Ky.) 639

## CHAPTER VIII.

### PROCEEDINGS FOR APPOINTMENT OF EXECUTORS AND ADMINISTRATORS.

#### 56. In General.

#### IN GENERAL.

56. These proceedings consist, in substance, of:

- (a) A petition signed either by the applicant for the appointment, or some person interested in the estate.
- (b) A citation issued by the judge of probate to all persons interested in the estate.
- (c) A hearing, at which the petitioner must give evidence to support his case, and objection may be made by those, if there are any, opposed to the granting of the petition.
- (d) A decision by the judge of probate granting or refusing the prayer of the petition.

#### *Petition.*

As to the petition, there is not any great degree of formality required, except that in many states printed blank forms are supplied by the probate office, which must be used. It should set forth the facts required to give the court jurisdiction.<sup>1</sup> For instance, it should show that the deceased, if a resident of the state, was a resident of the county where the petition is filed; but if it state that he was "late of" the county,<sup>2</sup> or if it is addressed to the judge of the county of X., and shows that A., late a resident of the county aforesaid, died in said county, it is enough.<sup>3</sup> The fact that it incorrectly states the date of death of deceased is generally unimportant.\* Nor will the fact that the petition leaves out the names of

<sup>1</sup> Beckett v. Selover, 7 Cal. 233; Townsend v. Gordon, 19 Cal. 206; Lucas v. Todd, 28 Cal. 186.

<sup>2</sup> Beckett v. Selover, *supra*; Abel v. Love, 17 Cal. 233.

<sup>3</sup> Townsend v. Gordon, 19 Cal. 188. Cf. *ante*, p. 35, c. 3.

\* Davis v. Miller (Ala.) 17 South. 323.

the other heirs of the estate, or the probable amount of the estate, deprive the court of jurisdiction to appoint the administrator,<sup>5</sup> nor if it does not describe the property of the estate.<sup>6</sup> If the petition shows on its face that the petitioner has not the right to administer, the grant of letters is void, and may be attacked in a collateral suit.<sup>7</sup> If, however, the petition does not set out the facts necessary to jurisdiction, and they are not apparent on the proceedings, the appointment may be attacked in collateral proceedings.<sup>8</sup>

### *Citation or Notice.*

The citation forms an important part of modern probate practice. It is a necessary prerequisite to the appointment of one having an inferior right to administer, in place of one having a superior right to that office, and letters granted without such citation are voidable, and will be revoked upon the application of the proper party;<sup>9</sup> but the letters are not void, and the objection that they were granted without notice cannot be taken by one not interested in the estate, in a collateral action, when he is sued by the executor or administrator.<sup>10</sup>

The ordinary form of citation at the present time is generally regulated by statute, and is not a personal notice to the parties interested, but a publication in a newspaper, or in some public place, of a notice of the petition, to all persons interested in the estate of the deceased.<sup>11</sup> It is held in some states that no citation is neces-

<sup>5</sup> Judd v. Ross, 34 N. E. 631, 146 Ill. 40.

<sup>6</sup> In re Miller, 49 N. W. 427, 32 Neb. 480.

<sup>7</sup> Haug v. Primeau, 57 N. W. 25, 98 Mich. 91. Cf. ante, p. 19, c. 2.

<sup>8</sup> Moore's Estate v. Moore, 50 N. W. 443, 33 Neb. 509. Cf. ante, p. 19, c. 2.

<sup>9</sup> Kelly v. West, 80 N. Y. 145; Wilcoxon v. Reese, 63 Md. 545; Smith v. Stockbridge, 39 Md. 645; Maupay's Estate, 2 Brewst. (Pa.) 491; Bieber's Appeal, 11 Pa. St. 162; Cleveland v. Quilty, 128 Mass. 580; Torrance v. McDougald, 12 Ga. 526; Succession of Talbert, 16 La. Ann. 230; Cobb v. Newcomb, 19 Pick. (Mass.) 336; Taylor v. Hosick, 13 Kan. 518; Todhunter v. Stewart, 39 Ohio St. 184. Cf. ante, p. 81, c. 5; Id., p. 125, c. 8.

<sup>10</sup> Marcy v. Marcy, 6 Metc. (Mass.) 367; Kelly v. West, 80 N. Y. 145; James v. Adams, 22 How. Prac. (N. Y.) 409; Sheldon v. Wright, 7 Barb. (N. Y.) 39; Taylor v. Hosick, 13 Kan. 518. Cf., on conclusiveness of decree in collateral actions, ante, p. 19, c. 2.

<sup>11</sup> Wells v. Child, 12 Allen (Mass.) 332; Sargent v. Fox, 2 McCord (S. C.) 309; Scott v. McNeal, 31 Pac. 873, 5 Wash. 309.



sary when the administration is granted to a person solely entitled to it, in preference to all others, as the widow, husband, next of kin, or husband of the daughter of the deceased, or two or more of them, in Maine;<sup>12</sup> and that where there are no persons having a prior right to administer, but only a class having equal rights, the judge may appoint one without notice or citation to the others,<sup>13</sup> unless there is a statutory provision to the contrary.<sup>14</sup> But it is believed that the better practice in such cases is to notify all parties belonging to the class, so that they may have an opportunity to present to the court any disqualifications which they may know of against the petitioner, and support their own claim, if they desire to do so; for there is a great principle of justice which declares that, in every proceeding of a judicial nature, it is essential to its validity that the person whose rights are to be affected should be a party to the proceedings, and have an opportunity to be heard.<sup>15</sup> It is sometimes provided by statute that notice need not be given to those resident out of the state or the county.<sup>16</sup>

The notice should contain a definite statement of the time and place of the hearing.<sup>17</sup> If the notice is duly published, it binds those to whom it applies, and the fact that one of them is at the time insane does not invalidate the proceedings as to him.<sup>18</sup>

The question has arisen whether such a public notice is sufficient to bind all parties interested in the estate, although some of them may never see it; and it is held that such a notice is all that is practicable, since in many cases the number of persons who ought to be served with notice, and the difficulty of ascertaining who are so entitled, render it impossible to have a notice of the proceedings served upon all personally.<sup>19</sup> Proof of due notice may be given in any legal

<sup>12</sup> *Bean v. Bumpus*, 22 Me. 549. Cf. ante, p. 81, c. 5; *Id.*, p. 118, c. 7.

<sup>13</sup> *Peters v. Public Adm'r*, 1 Bradf. (N. Y.) 200. Cf. ante, p. 81, c. 5.

<sup>14</sup> *Sayre v. Sayre*, 22 Atl. 198, 48 N. J. Eq. 267.

<sup>15</sup> *Id.*

<sup>16</sup> *Todhunter v. Stewart*, 39 Ohio St. 184. For this matter of practice, reference should be had to the local statutes.

<sup>17</sup> *Beckett v. Selover*, 7 Cal. 234.

<sup>18</sup> *Parker v. Parker*, 11 Cush. (Mass.) 524.

<sup>19</sup> *Arnold v. Sabin*, 1 Cush. (Mass.) 525, 529, 530; *Wells v. Child*, 12 Allen (Mass.) 332; *Cross v. Brown*, 51 N. H. 489.

manner, even though the statute authorizes proof by affidavit of the publisher, for this mode of proof is not exclusive.<sup>20</sup>

### *Hearing.*

At the hearing the judge should be satisfied of the existence of the facts necessary to support the applicant's case, before granting the application; for the probate court cannot move on a mere default, like a court of common law, but must have proof to support its action. Still, if there is no contest, the court commonly acts upon slight proof, especially if all the parties interested in the estate assent to the granting of the application. But, as the judge is the arbiter of the facts, he may order such degree of proof as he considers necessary, either by affidavits or other forms of testimony.<sup>21</sup> Thus, when one applied for administration as being the son of the deceased, and his legitimacy was denied by the public administrator, the marriage and birth being alleged to have taken place in France, the judge suspended proceedings, and issued a commission to take testimony on the subject in France.<sup>22</sup>

At the hearing on the petition the petitioner is regarded as the plaintiff, and has the right to open and close.<sup>23</sup> Only those who are in some way interested in the estate are allowed to petition, object, or offer proof.<sup>24</sup> A husband is generally interested in the estate of his deceased wife, if she left personalty.<sup>25</sup> The guardian of an infant who is interested in the estate is himself interested, so far as to allow him to represent the infant in the probate proceedings.<sup>26</sup> And so is one who is, by duly-executed power of attorney, appointed by a legatee and executrix to have in her name the will proved and

<sup>20</sup> State v. Shires, 39 Mo. App. 560.

<sup>21</sup> Burwell v. Shaw, 2 Bradf. (N. Y.) 322; Welch's Estate, Myr. Prob. 202; Jordan v. Thompson, 67 Ala. 469.

<sup>22</sup> Ferrie v. Public Administrator, 3 Bradf. (N. Y.) 151. Cf. ante, p. 75, c. 5; post, p. 389, c. 19.

<sup>23</sup> Weeks v. Sego, 9 Ga. 199.

<sup>24</sup> Cleveland v. Quilty, 128 Mass. 578; Augusta & S. R. Co. v. Peacock, 50 Ga. 146. Cf., as to amount of proof required, ante, p. 42, c. 3; Id., pp. 84, c. 5.

<sup>25</sup> Breen v. Pangborn, 16 N. W. 188, 51 Mich. 29. As to rights of husband, see ante, p. 59, c. 5; post, p. 373, c. 19.

<sup>26</sup> In re Chase, 32 Hun (N. Y.) 318.

letters of administration granted.<sup>27</sup> But one who is a debtor of the estate is not one interested in the estate.<sup>28</sup> A creditor, although living in another state, is "interested" in the estate;<sup>29</sup> but one who makes a contract with executors, by which the estate owes him a debt, is not a creditor of the deceased.<sup>30</sup>

The objection to the right of a party to appear, because he is not interested in the estate, is taken too late if it is first made on a hearing in the supreme court, on exceptions to the action of the court below as to matters of law,<sup>31</sup> nor can it be raised in a collateral proceeding.<sup>32</sup>

### *Decree.*

After hearing the parties entitled to offer proof in the case, the judge of probate makes a decree granting or refusing the prayer of the petition, according as he finds that the proof supports the petition or does not. And, if he grants the petition, letters of administration or letters testamentary issue, in accordance with the decree. The conclusiveness of this decree was examined in chapter 2.

<sup>27</sup> Russell v. Hart, 87 N. Y. 19.

<sup>28</sup> Drexel v. Berney, 1 Dem. Sur. (N. Y.) 163.

<sup>29</sup> Branch v. Rankin, 108 Ill. 444.

<sup>30</sup> Fowler v. Walter, 1 Dem. Sur. (N. Y.) 240. See, as to binding estate by contract of executor or administrator, post p. 259, c. 15; Id. p. 456, c. 22.

<sup>31</sup> Dean v. Biggers, 27 Ga. 73.

<sup>32</sup> Pick v. Strong, 3 N. W. 697, 26 Minn. 303.

## CHAPTER IX.

### SPECIAL KINDS OF ADMINISTRATIONS.

57. Administration with the Will Annexed (cum Testamento Annexo).
58. Administration of Goods not Administered (de Bonis non Administratis).
59. Must be Vacancy, and Assets Remaining Unadministered.
60. Administration during Minority.
61. Administration pendente Lite.
62. Public Administrator.
63. Executor de Son Tort.
64. Other Forms of Limited Administration.

### ADMINISTRATION WITH THE WILL ANNEXED (CUM TESTAMENTO ANNEXO.)

57. If the testator leaves a will, but without naming any executor, or if he names disqualified persons, or if the executors named refuse to act, or die before they receive letters testamentary, or if they fail to qualify by giving the bond required by statute for the proper performance of their duties, or if a sole (or surviving) executor, who has already proved the will and entered upon the duties of his executorship, dies, resigns, or is removed before having fully administered the estate,—in any of these cases there must be appointed an administrator with the will annexed. In the last case stated, the administrator is also *de bonis non administratis*.

The duties of the administrator cum testamento annexo are very nearly the same as those of the executor, for the execution of the will devolves upon him, except in so far as a personal trust or confidence was reposed in the executor.<sup>1</sup>

The persons who are entitled to the grant of this kind of administration have been previously discussed.<sup>2</sup>

The same provisions as to giving bond apply to the administrator

<sup>1</sup> Smith v. Fellows, 131 Mass. 20.

<sup>2</sup> See ante, p. 88, c. 5.

with the will annexed as are applicable to the case of executors. The form of this bond should be varied to meet the requirements of the case;<sup>3</sup> but it has been held that an ordinary administrator's bond is sufficient to hold the administrator cum testamento annexo and his sureties, since the condition is to administer the estate according to law, and the law provides that in case of testacy the estate shall be administered according to the will of the testator.<sup>4</sup>

It is held in England that a person who is entitled to be appointed executor, but declines, cannot be appointed administrator cum testamento annexo;<sup>5</sup> but in a case in Kentucky<sup>6</sup> it was held that a widow named as sole executrix might decline to act in that capacity, and yet be appointed administratrix with the will annexed.

When an administrator cum testamento annexo has been appointed, he is liable to the same provisions of law as other administrators, except that he distributes the estate according to the will of the testator.<sup>7</sup> As the office of administrator cum testamento annexo depends upon the validity of the will, the appointment of such administrator falls and becomes void with a decree of the probate court declaring the will void.<sup>8</sup> So, if the will is invalid by the laws of the domicile of the testator, no administration cum testamento annexo can be granted.<sup>9</sup>

#### ADMINISTRATION OF GOODS NOT ADMINISTERED (DE BONIS NON ADMINISTRATIS.)

**58. When a sole or surviving executor or administrator dies, resigns, or is removed before having fully administered the estate, the probate court appoints an administrator of the goods not already administered, or de bonis non administratis.**

<sup>3</sup> Ex parte Brown, 2 Bradf. (N. Y.) 22. Cf. post, p. 182, c. 12.

<sup>4</sup> Judge of Probate v. Claggett, 36 N. H. 386. And see Hartzell v. Com., 42 Pa. St. 453; but, contra, Small v. Com., 8 Pa. St. 101.

<sup>5</sup> 1 Williams, Ex'rs, 470; Bullock's Goods, 1 Rob. Eec. 275; Richardson's Goods, 1 Swab. & T. 515; Morrison's Goods, 2 Swab. & T. 129.

<sup>6</sup> Briscoe's Devisees v. Wickliffe, 6 Dana (Ky.) 157.

<sup>7</sup> Ex parte Brown, 2 Bradf. (N. Y.) 22. Cf. post, p. 350, c. 18.

<sup>8</sup> Smith v. Stockbridge, 39 Md. 645.

<sup>9</sup> Coleman's Estate, 13 Pa. Co. Ct. R. 81.

This species of administration is recognized both in England and the United States.<sup>10</sup> By the English law, if a sole or surviving executor died after proving the will, and died testate, the executorship regularly devolved upon his executor, if he had appointed one;<sup>11</sup> and this rule obtains in the United States, unless changed by statute.

But in many states, as has been previously seen, it is provided by statute that an executor of an executor shall not act as executor of the will of the first testator, but that an administrator de bonis non cum testamento annexo shall be appointed.<sup>12</sup>

If the executors named in the will die, renounce, or become incompetent before completing their duties, the administration to be granted should be, as has been already seen, cum testamento annexo.<sup>13</sup> The rules determining the person who may claim the right to administration de bonis non have already been examined.<sup>14</sup>

*Same County as Previous Administration.*

As administration de bonis non is but a continuance of the full administration or execution of the will, it is held that it should be granted in the same county, and by the same court, in which letters testamentary or of administration were originally granted.<sup>15</sup> And it is also held that the limitations as to time within which original administration must be taken out do not apply to this species of administration,<sup>16</sup> but the lapse of time may be so great as to prevent a grant of letters.<sup>17</sup>

<sup>10</sup> 2 Bl. Comm. 506; 1 Williams, Ex'rs, 171. In Ohio (Rev. St. §§ 6017, 6018) administration de bonis non is granted only in case there remain goods to the value of \$20 unadministered, or debts to the amount of \$20; and so in some other states. See ante, p. 41, c. 3.

<sup>11</sup> 2 Bl. Comm. 506; 1 Williams, Ex'rs, 471; Beer's Goods, 2 Rob. Ecc. 349.

<sup>12</sup> Wetzler v. Fitch, 52 Cal. 638; Kilburn v. See, 1 Dem. Sur. (N. Y.) 353. See ante, p. 53, c. 4.

<sup>13</sup> Ante, p. 128; 1 Williams, Ex'rs, 225, 471; Isted v. Stanley, Dyer, 372a; Hayton v. Wolfe, Cro. Jac. 614; In re Drayton's Will, 4 McCord (S. C.) 46.

<sup>14</sup> Ante, p. 90, c. 5.

<sup>15</sup> In re Elyster's Estate, 5 Watts (Pa.) 132; Ex parte Lyons, 2 Leigh (Va.) 761. See ante, p. 23, c. 2.

<sup>16</sup> Bancroft v. Andrews, 6 Cush. (Mass.) 493; In re Holmes, 33 Me. 577; Neal v. Charlton, 52 Md. 495; Adams v. Richardson's Estate, 27 S. W. 29, 5 Tex. Civ. App. 439. Cf. ante, p. 24, c. 2.

<sup>17</sup> Dodge v. Phelan, 21 S. W. 309, 2 Tex. Civ. App. 441.

*Citation before Appointment.*

In those states where the right to such administration is directed by statute, the same rules apply as to citation to those entitled to a prior right as obtain in regard to ordinary administration. The person having a preference is entitled to his day in court before being deprived of the right.<sup>18</sup> And, as between several equally entitled to such appointment, the practice of the court is the same as in regard to general letters of administration; that is, to grant to the one who has the largest interest in the estate.<sup>19</sup>

**MUST BE VACANCY, AND ASSETS REMAINING UNADMINISTERED.**

**59. The two preceding administrations depend upon two principal facts: First, that there is a vacancy in the office of executor or administrator; and, secondly, that there are assets remaining to be administered.**

The administrations de bonis non and cum testamento annexo are supplementary administrations, and are based upon the fact that there is a vacancy in the preceding administration, and if there is no such vacancy the grant of letters of administration de bonis non or cum testamento annexo is void.<sup>20</sup> There may be cases, however, in which the question of whether there is a vacancy or not may be difficult of decision, as when the former executor or administrator is removed from office and the proceedings for such removal are irregular or defective. This fact would throw a doubt upon the validity of the appointment of the succeeding administrator, but the question could not be raised in collateral proceedings.<sup>21</sup>

<sup>18</sup> Thomas v. Knighton, 23 Md. 327; Fowler v. Walter, 1 Dem. Sur. (N. Y.) 240. Cf. ante, p. 81, c. 5; Id. p. 118, c. 7; Id. p. 124, c. 8.

<sup>19</sup> In re Morgan's Estate, 2 How. Prac. N. S. (N. Y.) 194. Cf. ante, p. 80, c. 5.

<sup>20</sup> Haynes v. Meeks, 20 Cal. 288; Munroe v. People, 102 Ill. 406; Rambo v. Wyatt's Adm'r, 32 Ala. 363; Matthews v. Douthitt, 27 Ala. 273; Wahl v. Schierling, 39 N. E. 533, 11 Ind. App. 696. But see Printup v. Patton, 18 S. E. 311, 91 Ga. 422, and compare, on conclusiveness in collateral attack, ante, p. 19, c. 2.

<sup>21</sup> See ante, p. 19, c. 2.

There must also be assets remaining to be administered, otherwise there is no necessity for the supplementary appointment.<sup>22</sup> This second fact, however, need not be conclusively established. If a *prima facie* case of assets is made out, it is sufficient to give the court power to appoint such an administrator, and leave it to the common-law courts to settle the title to the property.<sup>23</sup> A claim which the former executor was prosecuting is an asset.<sup>24</sup> But it has been held that the claim that, if a certain judgment at common law is pronounced fraudulent and void by a court of common law, certain property will become assets, is not enough to support administration with the will annexed, because the probate court cannot undertake to settle rights of property, but must decide on a *prima facie* right.<sup>25</sup> If all the estate has been distributed, still, if there is a valid debt outstanding against the estate, this will in some states, by statute, authorize the granting of administration *de bonis non*, as the estate has not been fully administered;<sup>26</sup> but a legacy due from the estate is not such a debt.<sup>27</sup> Even if the debts are barred by the statute of limitations, it is said that they are still enough to give jurisdiction to appoint an administrator *de bonis non*, since the statute of limitation does not extinguish the debt, but only bars an action at law to recover it.<sup>28</sup> If certain debts due to the estate are marked as bad debts in an executor's final account, yet if they become collectible later an administrator *de bonis non* may be appointed to collect them and distribute the proceeds.<sup>29</sup>

If a power of sale of real estate is given by a will, and the application is made for the appointment of an administrator *de bonis*

<sup>22</sup> *Gavin v. Carling*, 55 Md. 536; *Donaldson v. Raborg*, 26 Md. 312. Cf. ante, p. 39, c. 3.

<sup>23</sup> *Scott v. Fox*, 14 Md. 393; *Pumpelly v. Tinkham*, 23 Barb. (N. Y.) 321. Cf. ante, p. 40, c. 3.

<sup>24</sup> *Hayward v. Place*, 4 Dem. Sur. (N. Y.) 487. And it is the duty of this administration to prosecute any valid claim of the estate. *Adams v. Brand* (Fla.) 20 South. 266.

<sup>25</sup> *Fowler v. Walter*, 1 Dem. Sur. (N. Y.) 240. Cf. ante, p. 40, c. 3.

<sup>26</sup> *Brattle v. Converse*, 1 Root (Conn.) 174; *Brattle v. Gustin*, Id. 425; *Bancroft v. Andrews*, 6 Cush. (Mass.) 493.

<sup>27</sup> *Chapin v. Hastings*, 2 Pick. (Mass.) 361.

<sup>28</sup> *Bancroft v. Andrews*, 6 Cush. (Mass.) 493.

<sup>29</sup> *Mallory's Appeal*, 25 Atl. 109, 62 Conn. 218.



non cum testamento annexo, and all the personal estate has been administered, this application will be refused; for the administrator de bonis non would not have authority to execute the trust conferred by the will upon the executor, of selling the real estate, and therefore the grant of letters would be useless and nugatory.<sup>30</sup> If all debts are paid, and nothing remains but distribution, still an administration de bonis non is necessary.<sup>31</sup>

Whether, if all the personal estate has been reduced to money, and nothing remains but to pay it over, there is any necessity of further administration, is differently decided by different courts. That there is not, since any distributee can sue direct for his share, is held in some states,<sup>32</sup> while in others it is held that the administrator de bonis non may recover this money from his predecessor for distribution.<sup>33</sup> Even though the preceding administrator may have filed a final account which has been allowed, the appointment of an administrator de bonis non will be presumed to have been justified by the existence of assets remaining to be administered, unless the contrary is proved.<sup>34</sup> A recital that the preceding administrator "had died without closing the business of the estate" is sufficient, in a collateral suit, to support the appointment.<sup>35</sup>

#### ADMINISTRATION DURING MINORITY.

**60.** Where a person who has been named sole executor in the will is under the legal age for assuming that office, the court may appoint an administrator during his minority; and so in the case of one named joint executor, unless there is another executor competent, who accepts the trust. But if there are several executors, and one or more is of full age

<sup>30</sup> Wilcoxon v. Reese, 63 Md. 542.

<sup>31</sup> Smith v. Doe, 33 Md. 450. But cf. ante, c. 2.

<sup>32</sup> Potts v. Smith, 3 Rawle (Pa.) 361; Carrick's Adm'r v. Carrick's Ex'r, 23 N. J. Eq. 366.

<sup>33</sup> Donaldson v. Raborg, 26 Md. 312; Judge of Probate v. Claggett, 36 N. H. 386; Pierce's Estate, 11 Montg. Co. Law Rep. 110.

<sup>34</sup> Rogers v. Johnson, 28 S. W. 635, 125 Mo. 202. Cf. ante, c. 2.

<sup>35</sup> Corley v. Goll, 27 S. W. 819, 8 Tex. Civ. App. 184.

and accepts the trust, those of full age should have the grant; and if, during the administration, a minor executor becomes of full age, he may be admitted to the office upon giving bond.

The preceding administrations are general in their nature, extending to the whole administration of the estate. There are, however, other administrations, limited in time or quality. Some of these are of little importance in the United States, but others are occasionally used. Of these, one is administration *durante minore ætate*, or *minoritate*.

The person to whom such administration shall be granted is in England held to be not under St. 21 Hen. VIII.,<sup>36</sup> before referred to,<sup>37</sup> and the grant is in the discretion of the probate court.<sup>38</sup> The practice in that country has been to grant it to the guardian of the infant, or the person who has a right to be such guardian, although the practice has not been invariable.<sup>39</sup>

In the United States provision is generally made by statute for the appointment of an administrator *durante minore ætate*, and the statutes generally confer this right on the guardian of the infant, as in New York.<sup>40</sup> In California<sup>41</sup> letters are granted in the discretion of the court to the guardian, or to any other person entitled to administration. In Georgia<sup>42</sup> the guardian of a minor interested in the estate has the right to take administration jointly with the person appointed, or alone if no other person is selected.

Whether an administrator *durante minore ætate* should be appointed in case of a minor entitled to administration of an intestate estate depends on the statutes. If so expressly provided, such an administrator should be appointed, but if infancy merely disqualifies the claimant some other person should be appointed to the

<sup>36</sup> Chapter 5.

<sup>37</sup> 1 Williams, Ex'rs, 479, 480.

<sup>38</sup> 1 Williams, Ex'rs, 481, 482; *In re Weir's Goods*, 2 Swab. & T. 451; *West v. Willby*, 3 Phillim. Ecc. 374.

<sup>39</sup> 1 Williams, Ex'rs, 481; *Briers v. Goddard*, Hob. 250; *Thomas v. Butler*, 1 Vent. 219.

<sup>40</sup> Ill. 3 Rev. St. (7th Ed.) p. 2291. Compare ante, p. 96, c. 6.

<sup>41</sup> Code Civ. Proc. § 1368.

<sup>42</sup> Code, § 2497.

office.<sup>43</sup> This administration terminates upon the arrival of the minor at full age. If the appointment is during the minority of several, it terminates upon the arrival of any one at full age.<sup>44</sup>

#### ADMINISTRATION PENDENTE LITE.

61. When, by reason of delay in granting letters testamentary or of administration, or for any other cause, the judge of probate deems it expedient, he may appoint a special administrator to collect and preserve the effects of the deceased.

The court has no power to appoint such an administrator after the probate of the will and the granting of letters testamentary, even though a caveat is filed which suspends the powers of the executors. It is only before letters have been granted, or after they have been revoked, that such administration is authorized,<sup>45</sup> nor can the court appoint such administrator pending a contest over the probate of a will which relates only to real estate,<sup>46</sup> in those states where the real estate of the deceased does not form part of the assets of the estate.

If there is no contest about the granting of letters, mere delay in taking out administration by those entitled is held in some states not to authorize this form of administration;<sup>47</sup> and if a will is declared void, and no appeal is taken, a later application by petition to determine whether a right exists to have this decision reversed does not constitute a contest which authorizes such a grant.<sup>48</sup>

The duties of such administrator are to collect and preserve all the personal estate for the person who may be appointed executor or administrator. If he is appointed while letters testamentary are in dispute, he may be authorized to take charge of the real estate,

<sup>43</sup> See ante, p. 96, c. 6.

<sup>44</sup> 1 Williams, Ex'rs, 485, 486; Freke v. Thomas, 1 Ld. Raym. 667; Shep. Touch. 490; Bac. Abr. "Executors and Administrators," E, 3; Taylor v. Watts, Freem. 425.

<sup>45</sup> Munnikhuysen v. Magraw, 35 Md. 289. As to who has the right to this appointment, see ante, p. 91, c. 5.

<sup>46</sup> Tooker v. Bell, 1 Dem. Sur. (N. Y.) 52.

<sup>47</sup> Sawmill Co. v. Dock, 3 Dem. Sur. (N. Y.) 55.

<sup>48</sup> Munnikhuysen v. Magraw, 35 Md. 280.

and to collect the rents, make necessary repairs, and do all other things needful for the preservation of the real estate, and as a charge thereon.

The powers of this special administrator relate to the collection and preservation of the estate. Therefore such an administrator generally has authority to carry on such suits as are necessary to collect and preserve the estate,<sup>49</sup> including a suit to redeem a mortgage.<sup>50</sup> But he has no power to dispose of any of the property.<sup>51</sup>

When letters testamentary or of administration are granted, his powers cease,<sup>52</sup> and he must give up all the estate to the executor or administrator; but the general administrator must give notice to creditors of his appointment, although such notice has been already given by the special administrator.<sup>53</sup> So the end of the contest pending which the special administrator is appointed revokes his authority, and he must thereupon deliver over the property and account for it.<sup>54</sup> But his authority lasts, pending an appeal, until the final grant of general administration.<sup>55</sup> On giving up the property and having a final settlement of his account, he must give notice to the regular executor or administrator, but need not notify the creditors and distributees of the estate.<sup>56</sup>

#### PUBLIC ADMINISTRATOR.

**62. In many states provision is made by statute for the appointment of a permanent officer in each county, whose duty it is to collect and administer the estates of those persons who leave no representatives in the state, and to represent the interests of the state in default of claimants to the property.**

<sup>49</sup> *Ewing v. Moses*, 50 Ga. 264.

<sup>50</sup> *Libby v. Cobb*, 76 Me. 474.

<sup>51</sup> *Tomlinson v. Wright*, 39 N. E. 884, 12 Ind. App. 292.

<sup>52</sup> *Libby v. Cobb*, *supra*.

<sup>53</sup> *Ex parte Worthington*, 54 Md. 359; *In re Lewis*, 17 N. Y. Wkly. Dig. 311. Cf. post, p. 188, c. 12.

<sup>54</sup> *Cole v. Wooden*, 18 N. J. Law, 15; *Gresham v. Pyron*, 17 Ga. 263; *Woolley v. Pemberton*, 5 Atl. 139, 41 N. J. Eq. 397.

<sup>55</sup> *Gresham v. Pyron*, 17 Ga. 263; *Crozier's Estate*, 4 Pac. 109, 65 Cal. 332.

<sup>56</sup> *Robards v. Lamb*, 8 Sup. Ct. 1031, 127 U. S. 58. Cf. post, p. 422, c. 20.

The right of the public administrator over the property ceases when a will is proved, or the persons entitled claim the right of administration, and he must then pay over to the administrator or executor all the moneys, etc., in his hands. If there are no creditors or other claimants, he deposits the money realized from the property in the treasury of the state for the benefit of lawful claimants, who may, within a limited time after the deposit of the balance in the treasury of the state, claim administration and receive the fund.

The priority of right of a public administrator as compared with creditors and next of kin has been already discussed.<sup>57</sup>

### EXECUTOR DE SON TORT.

63. If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased, and the like), he is called in law an executor of his own wrong (*de son tort*), and is liable to all the trouble of an executorship, without any of the profits or advantages; but merely doing acts of necessity or humanity, as locking up the goods or burying the corpse of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong.

This species of executorship, although illegal in its inception, has some of the characteristics of a regular executorship.<sup>58</sup>

In many states this form of liability is recognized by statute or decision, although statutory remedies for any intermeddling with

<sup>57</sup> See ante, p. 85, c. 5; *Morgan's Estate*, 53 Cal. 243; *Yee Yun's Estate*, Myr. Prob. (Cal.) 181; *Murphy's Estate*, Id. 185; *Robie's Estate*, Id. 226; *Kelly's Estate*, 57 Cal. 81.

<sup>58</sup> 2 Bl. Comm. 507. The writers of the ecclesiastical courts define an executor *de son tort*, as one "who takes upon himself an office of executor by intrusion, not being so constituted by the deceased, nor for want of such constitution substituted by the ecclesiastical court to administer." Swinb. Wills, pt. 4, § 23, pl. 1; Godol. pt. 2, c. 8, § 1; Went. Off. Ex'r (14th Ed.) p. 320, c. 14; *Mitchel v. Lunt*, 4 Mass. 658; *Bacon v. Parker*, 12 Conn. 213; *Bennett v. Ives*, 30 Conn. 329; *Wilson v. Hudson*, 4 Har. (Del.) 168; *White v. Mann*, 26 Me. 361.

the estate are frequently added to the common-law rules.<sup>59</sup> In some states, however, the courts have said that probably no such office is recognized by their statutes.<sup>60</sup>

It has been held that very slight acts of intermeddling with the goods of the deceased will make a person executor *de son tort*. Any act which evinces a legal control of the goods by possession or direction will, unexplained, make the person exercising the control, or having this possession, liable as executor;<sup>61</sup> and especially demanding or receiving debts due to the deceased,<sup>62</sup> or paying debts due by him,<sup>63</sup> or selling or converting to his own use goods belonging to the deceased's estate.<sup>64</sup> Nor is it any excuse that one so charged acted under the belief that the supposed deceased was alive, and was acting as his agent, but without any authority.<sup>65</sup>

But there are many acts which do not impose this liability, as they are necessary acts of kindness and charity, such as locking up the goods of the deceased for preservation, directing the funeral and paying the expenses thereof, feeding the cattle of the deceased, providing for his children, and other acts of a similar nature.<sup>66</sup>

<sup>59</sup> N. H. Gen. Laws, c. 195, § 15; Mass. Pub. St. c. 132, §§ 17, 18; N. Y. 3 Rev. St. (7th Ed.) pp. 2292, 2395; Me. Rev. St. c. 64, § 37; Ga. Code, § 2441; R. I. Pub. St. c. 184, § 36; Mich. Ann. St. § 5856; N. J. Revision, p. 396, §§ 2, 6; *De La Guerra v. Packard*, 17 Cal. 192; *Valencia v. Bernal*, 26 Cal. 328; *McConnell v. McConnell*, 94 Ill. 298; *Crispin v. Winkleman*, 10 N. W. 919, 57 Iowa, 526; *Madison v. Shockley*, 41 Iowa, 452.

<sup>60</sup> *Pryor v. Downey*, 50 Cal. 399; *Ansley v. Baker*, 14 Tex. 607; *Redf. Prac. Sur. Cts.* 220; *Rust v. Witherington*, 17 Ark. 129; *Barasien v. Odum*, Id. 122; *Fox v. Van Norman*, 11 Kan. 214.

<sup>61</sup> *Emery v. Berry*, 28 N. H. 473; *Campbell v. Tousey*, 7 Cow. (N. Y.) 64; *Lee v. Chase*, 58 Me. 435; *White v. Mann*, 26 Me. 361; *Mitchel v. Lunt*, 4 Mass. 659; *Root v. Geiger*, 97 Mass. 178.

<sup>62</sup> *Godol. pt. 2, c. 8, § 1*; *White v. Mann*, 26 Me. 370, 371; *Leach v. Pillsbury*, 15 N. H. 137.

<sup>63</sup> *Bennett v. Ives*, 30 Conn. 329.

<sup>64</sup> *Read's Case*, 5 Coke, 33b; *Padget v. Priest*, 2 Term. R. 97; *Allen v. Kimball*, 15 Me. 116; *Glenn v. Smith*, 2 Gill & J. (Md.) 513; *Root v. Geiger*, 97 Mass. 178; *Wilson v. Hudson*, 4 Har. (Del.) 168; *Truett v. Cummons*, 6 Ill. App. 73.

<sup>65</sup> *White v. Mann*, 26 Me. 361.

<sup>66</sup> *Went. Off. Ex'r*, p. 323, c. 14; *Godol. pt. 2, c. 8, §§ 6, 8*; *Stokes v. Porter*, 2 Dyer, 166b, in margin; *Perkins v. Ladd*, 114 Mass. 420; *Tucker v. Nebeker*, 2 App. D. C. 326; *Glenn v. Smith*, 2 Gill & J. 513; *Emery v. Berry*, 28 N. H. 473;

And it is only interference with the personal property of the deceased which has this effect, for as to wrongs committed to the real estate the wrongdoer is a trespasser, and liable as such to those entitled to the real estate.<sup>67</sup>

But there may be such an interference with a leasehold interest or a term of years as will make the one who so interferes executor de son tort, as where a man enters upon the land leased to the deceased and takes possession, claiming the particular estate.<sup>68</sup> And, if the heirs of a deceased mortgagee enter to foreclose and receive rents and property, they become liable as executors de son tort, since they have not the right to foreclose, the mortgage being personal property and going to the administrator.<sup>69</sup>

Moreover, the personal property must belong to the estate, for if there has been a sale of it, or a voluntary conveyance, even, which has not been avoided by creditors before the death of the intestate, the person who then holds it cannot be charged as such executor;<sup>70</sup> but if the sale was fraudulent, and of such a nature that it may be avoided by creditors, and is so avoided, such as a person may be charged as executor de son tort if he intermeddles with the goods.<sup>71</sup>

After an administrator or executor has been appointed, one who intermeddles with the estate is not an executor de son tort, but is liable to such executor or administrator as a trespasser;<sup>72</sup> but if such trespasser takes goods, or otherwise acts in the estate, claiming to be executor or administrator, he may be charged as executor de son tort.<sup>73</sup> If one acts simply as agent for another in intermed-

Bacon v. Parker, 12 Conn. 212; Taylor v. Moore, 47 Conn. 278. See Abb. Desc., Wills & Adm. § 102, and Walton v. Hall's Estate, 29 Atl. 803, 66 Vt. 455.

<sup>67</sup> Mitchel v. Lunt, 4 Mass. 658, 659; Nass v. Van Swearingen, 7 Serg. & R. (Pa.) 192, 196; King v. Lyman, 1 Root (Conn.) 104; Pryor v. Downey, 50 Cal. 399.

<sup>68</sup> Godol. pt. 2, c. 8, § 5; Garth v. Taylor, 1 Freem. 261; Paull v. Simpson, 9 Adol. & E. (N. S.) 365.

<sup>69</sup> Haskins v. Hawkes, 108 Mass. 381.

<sup>70</sup> Morrill v. Morrill, 13 Me. 415.

<sup>71</sup> Allen v. Kimball, 15 Me. 116; Root v. Geiger, 97 Mass. 178.

<sup>72</sup> Godol. pt. 2, c. 8, § 3.

<sup>73</sup> Read's Case, 5 Coke, 34b; Godol. pt. 2, c. 8, § 1; Dorsey v. Smithson, 6 Har. & J. (Md.) 61; Chamberlayne v. Temple, 2 Rand. (Va.) 384.

dling with the estate, it has been held that the principal is liable as executor de son tort, and not the agent.<sup>74</sup>

One who purchases in good faith of an executor de son tort does not himself become liable as such executor,<sup>75</sup> unless the facts of the case show collusion, in which case both would be liable.<sup>76</sup> Under the statutory system of probate law in Maryland, however, sale by such executor is void and passes no title, since by statute it is there provided that any sale, even by a regularly appointed executor, made without an order of the court, is void.<sup>77</sup>

Nor is one who takes the goods under a claim of right in himself, and the claim is bona fide and colorable, an executor de son tort, although he may fail in making out his title to the goods.<sup>78</sup> Nor one who takes the goods as agent for, or by authority of, a duly-appointed executor or administrator.<sup>79</sup>

If the one who intermeddles afterwards takes out regular letters of administration, he thereby cures the tortious acts, and is liable only as an ordinary administrator,<sup>80</sup> and if he has received payments of money, and given receipts therefor, he is liable in his accounts as administrator for the money, and the person to whom he gave the receipt is protected by it from suit by the administrator;<sup>81</sup> and if he sells goods of the estate while he is such executor de son tort, and afterwards is regularly appointed administrator, he may ratify the sale, and sue the vendee for the price.<sup>82</sup> But it is said that the administrator thus appointed is not bound by his previous acts.<sup>83</sup>

<sup>74</sup> *White v. Mann*, 26 Me. 366, 367; *Valencia v. Bernal*, 26 Cal. 328.

<sup>75</sup> *Godol.* pt. 2, c. 8, § 1; *Smith v. Porter*, 35 Me. 287; *Paull v. Simpson*, 9 *Adol. & E. (N. S.)* 365.

<sup>76</sup> *Paull v. Simpson*, 9 *Adol. & E. (N. S.)* 365.

<sup>77</sup> *Rockwell v. Young*, 60 Md. 563. See post, p. 280.

<sup>78</sup> *Femings v. Jarrat*, 1 *Esp.* 336; *Smith v. Porter*, 35 Me. 287; *Densler v. Edwards*, 5 *Ala.* 31.

<sup>79</sup> *Hall v. Elliot, Peake*, 87; *Turner v. Child*, 1 *Dev. (N. C.)* 25.

<sup>80</sup> *Shillaber v. Wyman*, 15 *Mass.* 324; *Emery v. Berry*, 28 *N. H.* 473; *Pinkham v. Grant*, 3 *Atl.* 179, 78 *Me.* 158.

<sup>81</sup> *Alvord v. Marsh*, 12 *Allen (Mass.)* 604.

<sup>82</sup> *Hatch v. Proctor*, 102 *Mass.* 351.

<sup>83</sup> *Wilson v. Hudson*, 4 *Har. (Del.)* 168.



The question whether one is liable as such executor is one of law, and not to be left to a jury, although the question whether he did the acts which are complained of is for the jury whenever the question arises before that tribunal.<sup>84</sup> If the death of the deceased is doubtful, that must be found as a fact by the jury.<sup>85</sup>

*Liability of Executor de Son Tort.*

At common law the executor de son tort is liable not only to the rightful executor or administrator, but also to all persons aggrieved by his acts in regard to the estate, whether they are creditors or legatees.<sup>86</sup> As to creditors, his liability is generally only to the extent of the assets which he has taken. Thus, if he shows that he has paid debts of the estate which exhausted the assets that came into his hands, this is a good bar to an action;<sup>87</sup> or he may show that he has delivered all the assets that came into his hands to the rightful administrator before action brought;<sup>88</sup> but such a delivery after action brought is held not to bar the action, even though no administration is granted to any one till after the suit was brought.<sup>89</sup> But if the executor de son tort in an action by a creditor pleads ne unques executor, and this plea is found against him, he is held at common law to admit assets by his pleading, and the judgment will be satisfied out of his own property, if the assets of the estate in his hands are not sufficient.<sup>90</sup> The executor de son tort cannot, in a suit by a creditor, attempt to retain a debt due to himself out of the assets; for, if this mode of paying debts were adopted, each executor would become de son tort.<sup>91</sup> But an executor de son tort is not liable for breaches of the duties of an ordinary ex-

<sup>84</sup> Padget v. Priest, 2 Term R. 99.

<sup>85</sup> White v. Mann, 26 Me. 370.

<sup>86</sup> Godol. pt. 2, c. 8, § 2; Elder v. Littler, 15 Iowa, 65. See Mechem, Cas. Succ. p. 136; Hatch v. Proctor, 102 Mass. 351.

<sup>87</sup> Went. Off. Ex'r, pp. 333, 334, c. 14; Stokes v. Porter, 2 Dyer, 166b, in margin.

<sup>88</sup> Anon., 1 Salk. 313.

<sup>89</sup> Curtis v. Vernon, 3 Term R. 587.

<sup>90</sup> Robbins' Case, Noy, 69; Went. Off. Ex'r (14th Ed.) pp. 331, 332, c. 14; Mitchel v. Lunt, 4 Mass. 654, 658.

<sup>91</sup> Coulter's Case, 5 Coke, 30a; Carey v. Guillow, 105 Mass. 18, 21, per Chapman, C. J.

ecutor, for he does not have the office and all its duties, but his liability arises from his tortious acts only. Thus, he is not responsible for negligently allowing the land or other property of the deceased to be taken for debt, as a regular executor would be.<sup>92</sup>

As to his liability to the rightful executor, it is clear that he is liable to the full value of the assets he has received, except so far as he has applied the assets to the payment of debts and expenses which the regular executor or administrator would have been compelled to pay.<sup>93</sup> In the United States the liability of an executor de son tort has been largely formulated by statute, but in general the liability remains much as it was at common law. Thus, he is generally held liable to any person aggrieved by his intermeddling, but only to the extent of assets;<sup>94</sup> and to the rightly-appointed executor or administrator, up to the amount of the assets of the estate which he has taken, and for all damages resulting from his acts relating to the estate.<sup>95</sup>

#### OTHER FORMS OF LIMITED ADMINISTRATION.

##### 64. Forms of special or limited administration which sometimes occur are:

- (a) Administration of property left undevise.
- (b) Administration ad litem.
- (c) Consular administration.

##### *Property Left Undevise.*

There are other special and limited forms of administration which are allowed in England for special pieces of property or special purposes or times, but they have either no application at all, or a very limited one, under the statutes of the United States, yet are

<sup>92</sup> *Mitchel v. Lunt*, 4 Mass. 658; *Brown v. Leavitt*, 26 N. H. 494, 495; *Campbell v. Sheldon*, 13 Pick. (Mass.) 8; *Kinard v. Young*, 2 Rich. Eq. (N. C.) 247.

<sup>93</sup> *Graysbrook v. Fox*, Plowd. 282; *Padget v. Priest*, 2 Term R. 100; *Carey v. Guillo*, 105 Mass. 18, 21; *Weeks v. Gibbs*, 9 Mass. 74; Mass. Pub. St. c. 132, § 18.

<sup>94</sup> *Hill v. Henderson*, 13 Smedes & M. (Miss.) 688; *Elder v. Littler*, 15 Iowa, 65; Mass. Pub. St. c. 132, § 17.

<sup>95</sup> Mass. Pub. St. c. 132, § 18.

sometimes recognized. Thus, when a portion of an estate is left undevised by a testator, it has been held that one may be appointed administrator cum testamento annexo of the property devised, and also administrator by special grant of such portion of the estate as is not devised; for, strictly speaking, an executor has no power as such, in the absence of statutory authority, to administer any portion of the estate which is not devised by the will, and a fortiori an administrator cum testamento annexo cannot administer such estate; and therefore further appointment as general administrator of this limited property was at common law necessary, and has been recognized in several of the United States.<sup>96</sup>

In most states, however, such undevised estate is by statute to be administered upon by the executor, but as an intestate estate; and in such case the practice of the probate courts has been to allow this special administration without further appointment or taking out any more letters;<sup>97</sup> and when this is the case the executor not only has the right, but is bound by law, to administer the undevised portion of the estate as well as that devised.<sup>98</sup>

#### *Administration ad Litem.*

Another is the appointment of a person as administrator ad litem. Thus, it was held that a mortgagee who was proceeding in equity to foreclose the mortgage was entitled to administration ad litem of the estate of a subsequent mortgagee, who had died a nonresident of the state, and on whose estate no other representation in the state had been taken out; this limited administration being necessary to carrying out the foreclosure suit, and not giving any right to receive the money collected on the mortgage, or otherwise interfere with the estate.<sup>99</sup>

<sup>96</sup> Harper v. Smith, 9 Ga. 461; Venable v. Mitchell, 29 Ga. 566; Dean v. Biggers, 27 Ga. 73; Montague v. Carneal, 1 A. K. Marsh. (Ky.) 351; Owens v. Cowan's Heirs, 7 B. Mon. (Ky.) 152; Montgomery v. Millikin, 5 Smedes & M. (Miss.) 151; Moody v. Vandyke, 4 Bin. (Pa.) 31; Drayton v. Grimke, 1 Bailey, Eq. (S. C.) 392; Perry v. Gill, 2 Humph. (Tenn.) 218.

<sup>97</sup> Mass. St. 1783, c. 24, § 10; Hays v. Jackson, 6 Mass. 152; Parris v. Cobb, 5 Rich. Eq. (S. C.) 450; Newcomb v. Williams, 9 Metc. (Mass.) 533; Conn. Gen. St. § 564; Vt. R. L. § 2089.

<sup>98</sup> Newcomb v. Williams, 9 Metc. (Mass.) 533.

<sup>99</sup> Lothrop's Case, 33 N. J. Eq. 246. See, also, Martin v. Railroad Co., 92 N.

*Consular Administration.*

In the United States a special administration in foreign parts is provided, namely, that in case the laws of the country permit, when any citizen of the United States, other than a seaman belonging to a vessel, dies in his consulate, leaving no legal representative, partners in trade, or trustee by him appointed, it shall be the duty of the consul to take care of his effects, to take possession of them, sell them, and, after payment of debts, remit the balance to the treasury of the United States, unless they are previously claimed by the party legally entitled to them.<sup>100</sup> It is also provided in England that the estates of intestate foreigners may be settled by the consuls or consular agents of the country of which they were citizens, if there is no person present who is entitled to the grant of administration by law, in all cases where similar powers are given to the English consuls in foreign countries.<sup>101</sup>

Y. 70, where letters to prosecute a claim for the death of the intestate by the negligence of a corporation were granted, but limited so as not to give power to collect the money on the claim, or compromise it without further bond being given.

<sup>100</sup> U. S. Rev. St. p. 305, § 1709.

<sup>101</sup> St. 24 & 25 Vict. c. 121, § 4. See U. S. Rev. St. §§ 1709, 1992, et seq.

## CHAPTER X.

### FOREIGN AND INTERSTATE ADMINISTRATION.

- 65. Limit of Validity of Letters.
- 66. Validity of Foreign Wills of Personal Property.
- 67. Validity of Foreign Wills Disposing of Real Estate.
- 68. Effect of Foreign Probate.
- 69. Foreign Intestate Estates.
- 70-71. Principal and Ancillary Administration.
- 72. Payment to and Receipt by Foreign Executor or Administrator a Good Discharge.
- 73. Liability for Assets Brought into the State of Ancillary Administration.
- 74. In what State Suit is to be Brought.
- 75. Payment of Debts Governed by Law of Forum.
- 76. Distribution of Estate among Legatees and Distributees.
- 77. Effect of Accounts Rendered in Different States.

### LIMIT OF VALIDITY OF LETTERS.

65. Letters testamentary, or of administration, granted by the probate court, are valid de jure only within the limits of the state by whose laws the court granting the letters is created; and any title, either of executors or administrators, derived from that grant, will be valid de jure only within the same jurisdiction.

The appointment of an executor or administrator to his office is in effect creating an officer of the court, and his powers and authority, being derived from the court, can have no absolute mandatory force beyond the limits of the state or country which has created the court appointing him.<sup>1</sup> It often happens, however, that the decedent left property situated in several states or countries. Questions then arise as to the legal method of carrying out a will relating to such estate, or of administering the estate in case of intestacy. This situation has given rise to the rules of law relating to principal, or, as it is sometimes called, domiciliary, and the subordinate or

<sup>1</sup> Story, Conf. Laws, § 512; Smith v. Guild, 34 Me. 443.

ancillary administration. Before examining these rules, a short statement will be made of the rules governing the validity of foreign wills, and the question of foreign intestacy.

#### VALIDITY OF FOREIGN WILLS OF PERSONAL PROPERTY.

**66. The validity of a will of personal property is decided by the laws of the country or state in which the testator was domiciled at the time of his death.**

If the will was valid, either in general, as to personal property, or in regard to any special bequests of personal property in the country in which the testator was domiciled at the time of his death, then it is so far valid in any other country or state.<sup>2</sup> This rule is merely an application of the general principle that movable property follows the person of its owner, and is governed by the laws of the place where he has his domicile. An apparent exception to this rule is found in the rule that where a power of appointment as to personal property is given to be exercised by will, and the power is exercised by a will executed in a manner and form which is valid in the state where the personal property is situated, but not valid at the domicile of the testator, this will is considered to be a good execution of the power.<sup>3</sup> It is to be noticed, however, that the question here is not the validity of the will, but rather the execution of a power, in regard to which the courts are strict in holding that it must be correct in every particular; according to the law of the place where the property is situated. Thus, in a case decided in Massachusetts, a resident of Massachusetts died, giving property to trustees resident in Massachusetts, to hold for the benefit of his daughter for her life, and after her death to convey it to whomever she should appoint by any deed or writing by her signed in the presence of three witnesses, or by her will, or any writing purporting

<sup>2</sup> Story, Conf. Laws, § 465; Flannery's Will, 24 Pa. St. 502; Carey's Appeal, 75 Pa. St. 201; In re Pretto's Will, 4 Phila. 380; In re Thomason's Estate, 37 Leg. Int. 290; Knox v. Jones, 47 N. Y. 396; Wood v. Wood, 5 Paige (N. Y.) 596; Despard v. Churchill, 35 N. Y. 199; Parsons v. Lyman, 20 N. Y. 103; De Sobry v. De Laistre, 2 Har. & J. (Md.) 191.

<sup>3</sup> Story, Conf. Laws, § 473a; In re Bingham's Estate, 1 Leg. Gaz. 31; Bingham's Appeal, 64 Pa. St. 345.

to be her last will, signed in the presence of a like number of witnesses. She married a resident of Baltimore, and resided there till her death. She left a will executed in Baltimore, signed in the presence of three witnesses, in which she devised and bequeathed all the real and personal estate to which she should be entitled in law or equity at the time of her decease unto her husband, his heirs and assigns, absolutely. This will was, by the laws of Maryland, an insufficient execution of the power, since in that state the execution of the power must refer in some way to the power or the specific subject of it, but was a sufficient execution in Massachusetts, where a general devise or bequest is considered to include a power of appointment, unless a different intention is expressed. The court held that, as far as the formal execution of the power was concerned, it was good if it was valid by the law of either state, and that, as to the question of construction involved in the power, that should be decided by the law of Massachusetts, since the property in question was situated in that state, being in the hands of trustees resident in Massachusetts; and for this reason the law of Massachusetts should govern the case.<sup>4</sup> It seems, that, as far as the formal execution of such a power is concerned, it will be good if it is valid by the law of the domicile of the donor or donee of the power.<sup>5</sup>

#### *Rules as to Domicile.*

The rules governing the questions of domicile have been before somewhat considered in connection with the subject of jurisdiction of the probate courts in case of estates of nonresidents.<sup>6</sup> It may be well, however, to recapitulate the leading principles governing the subject: Every person has a domicile somewhere, in legal contemplation, and can have but one, which is presumably at the place where he was born; and this domicile of origin is presumed to continue until a change of domicile is proved.<sup>7</sup> A change of domicile, in order to affect the right of distribution of his estate, must not

<sup>4</sup> Sewall v. Wilmer, 132 Mass. 131.

<sup>5</sup> D'Huart v. Harkness, 34 Beav. 324; Tatnall v. Hankey, 2 Moore, P. C. 342.

<sup>6</sup> Ante, p. 35, c. 3.

<sup>7</sup> Somerville v. Somerville, 5 Ves. 750, 786, 787; Abington v. North Bridge-water, 23 Pick. (Mass.) 170; Graham v. Public Administrator, 4 Bradf. (N. Y.) 128; De Bonneval v. De Bonneval, 1 Curt. Ecc. 856.

only be a change of actual residence, but such a change combined with an intention to change the domicile,—to abandon the former domicile and acquire a new one. A change of actual residence, although it is strong evidence, especially if it is long continued, of an intention to change the domicile, is not of itself sufficient to effect such a change.<sup>8</sup>

Since the validity of a will of personal property depends upon its validity at the domicile of the testator, and not at the place where the will was originally executed, it results that if the testator changes his domicile, after making the will, into a country where the will is invalid, and dies there, the will is invalid everywhere.<sup>9</sup> Thus, when one domiciled in South Carolina made a will which was valid there, and then removed to New York, where the will was not properly executed, and died, it was held that he died intestate.<sup>10</sup>

But where a citizen of New York went to Nice, and sojourning there without intending to remain, but merely for the benefit of her health, executed a will valid according to the laws of New York, but not according to the laws of Nice, and the testator afterwards changed her intention of returning home, believing that her health would not permit it, but without intending to change her domicile, and died at Nice, the court held that the will was valid, her domicile remaining in New York; but it was admitted that, if her domicile had been changed to Nice after the execution of the will, it would have been void.<sup>11</sup>

#### VALIDITY OF FOREIGN WILLS DISPOSING OF REAL ESTATE.

**67. The validity of a will of real estate, as to capacity of testator, form, and execution, depends upon, and is governed by, the law of the place where the land or real estate is situated.**

<sup>8</sup> *Moorhouse v. Lord*, 10 H. L. Cas. 283, 292; *Hodgson v. De Beauchesne*, 12 Moore, P. C. 285, 328; *Collier v. Rivaz*, 2 Curt. Ecc. 857; *Whicker v. Hume*, 7 H. L. Cas. 139. Cf. ante, p. 37, c. 3.

<sup>9</sup> Story, *Conf. Laws*, § 473.

<sup>10</sup> *Moultrie v. Hunt*, 23 N. Y. 396.

<sup>11</sup> *Dupuy v. Wurtz*, 53 N. Y. 560.



This, again, is merely an application of the general principle that immovable property is governed by the law of the country or state in which it lies.<sup>12</sup> Thus, a devise of real estate in New York by a testator resident in Massachusetts, which is valid by the law of the latter state, but void by the law of New York, as being an illegal restraint of alienation, will not be enforced in New York, but the estate will descend to the heirs at law.<sup>13</sup>

*Statutory Provisions as to Foreign Wills.*

The foregoing rules are those adopted by general consent in all countries and states, as part of private international law. In many of the United States there are statutes enacted by which it is provided that a will made out of the state, which is valid according to the laws of the state or country where it was made, may be proved and allowed, and shall thereupon have the same effect that it would have had if executed according to the laws of the state where it is proved.<sup>14</sup>

In most states, also, statutes are enacted which allow any will which has been probated in a foreign country to be recorded and allowed as a valid will. These statutes simplify the mode of proof by enacting that the probate of the will shall be proof of its validity in the foreign country.<sup>15</sup>

<sup>12</sup> Story, Conf. Laws, § 474; *Livermore v. Haven*, 23 Pick. (Mass.) 118; *Flannery's Will*, 24 Pa. St. 502; *Carey's Appeal*, 75 Pa. St. 201; *In re Thomson's Estate*, 37 Leg. Int. 290.

<sup>13</sup> *Hobson v. Hale*, 95 N. Y. 610.

<sup>14</sup> Conn. Gen. St. § 538; Kan. Comp. Laws, c. 117, § 25; Mass. Pub. St. c. 127, § 5; Me. Rev. St. c. 64, § 12; Vt. Rev. Laws, § 2057.

<sup>15</sup> Me. Rev. St. c. 64, § 13; Vt. Rev. Laws, § 2058; N. J. Revision, "Orphans' Courts," §§ 23-26; Md. Rev. Code, art. 49, § 31; Conn. Gen. St. § 550; Ala. Code, §§ 1985, 1986; Ga. Code, § 2434 (a); N. H. Gen. Laws, c. 194, § 13; Kan. Comp. Laws, c. 117, § 24; Ky. Gen. St. c. 113, § 30; Miss. Rev. Code, § 1976; S. C. Gen. St. § 1875. And the same is true in Florida and Rhode Island, only when the will is validly executed by the laws of those states. R. I. Pub. St. c. 183, §§ 6-10; McClell. Fla. Dig. p. 987, § 8.

## EFFECT OF FOREIGN PROBATE.

68. Probate of a will in one country is conclusive of the validity of the will in all other countries. The judgment of a court of probate allowing the proof of a will is to some extent like a proceeding in rem, —binding upon the rights of all persons interested in the property named, although they are not named as parties in the case.

The duty of the probate court, therefore, when a will already probated in a foreign country is offered to it for probate, consists in deciding whether the record presented is duly authenticated, whether the court in which the will purports to have been allowed had jurisdiction, and whether there is any estate, real or personal, in the county on which the will may operate, and perhaps as to actual fraud in obtaining probate of the will. But as to all facts necessary to the establishment of a will, and as to the regularity of the proceedings, and their conformity to the laws of the country or state where they are had, the judgment itself must be conclusive, both by the constitution of the United States, giving such effect to the judgments of the different states, and by the common law.<sup>16</sup> Among the questions which are settled by the foreign probate are the capacity and sanity of the testator, including the power of a married woman to make a will, the due execution of the will, the competency of the witnesses, and the regularity of the proceedings for probate.<sup>17</sup>

Both as to wills of personalty and realty, a will is to be interpreted according to the laws and customs of the country or state of the domicile of the testator, since he is supposed to have been conversant with those laws and customs and language.<sup>18</sup>

<sup>16</sup> Crippen v. Dexter, 13 Gray (Mass.) 333.

<sup>17</sup> Crippen v. Dexter, 13 Gray (Mass.) 333; Dublin v. Chadbourn, 16 Mass. 433; Parker v. Parker, 11 Cush. (Mass.) 519. Cf. Carpenter v. Bell (Tenn. Sup.) 34 S. W. 209.

<sup>18</sup> Story, Confl. Laws, § 479a, f, h; Dawes v. Boylston, 9 Mass. 337.

## FOREIGN INTESTATE ESTATES.

69. The distribution of personal property of intestates is governed by the law of the deceased owner's domicile at the time of his death; and the question who is entitled to distribution is settled by that law, regardless of where the property is situated, or in what court or state the question of distribution arises. The succession to real estate, on the other hand, is decided by the law of the place where the real estate is situated.

As was said above, the question whether a valid will of personal property has been left by the deceased is decided by the laws of the state or country in which he resided or had his domicile at the time of his death. This decision involves also the decision of the question whether the deceased died testate or intestate. The same law governs all questions about the distribution of the personal estate (e. g. who is entitled thereto, and in what shares) in all courts in which the question may arise.<sup>19</sup> The succession to real estate however, is governed in all courts by the *lex loci rei sitæ*,—the law of the place where it is situated.<sup>20</sup> This difference as to the law governing the two kinds of property is applicable to every case in which the question arises.

## PRINCIPAL AND ANCILLARY ADMINISTRATION.

70. Principal or domiciliary administration of an estate is that which is taken out in the state or country where the deceased had his domicile at the time of his death. Administration taken out in any other

<sup>19</sup> Story, Conf. Laws, § 480a; *In re Ruppener's Will* (Surr.) 37 N. Y. Supp. 429; *Lawrence v. Kitteridge*, 21 Conn. 582; *Holcomb v. Phelps*, 16 Conn. 133; *Fay v. Haven*, 3 Metc. (Mass.) 109; *Dawes v. Boylston*, 9 Mass. 337; *Varnum v. Camp*, 13 N. J. Law, 332; *Lewis v. Grogard*, 17 N. J. Eq. 428; *Johnson v. Copeland's Adm'r*, 35 Ala. 521; *Goodman v. Winter*, 64 Ala. 410; Ala. Code, § 2153; *Dixon's Ex'rs v. Ramsay's Ex'rs*, 3 Cranch, 319.

<sup>20</sup> Story, Conf. Laws, §§ 483, 484; *Grimball v. Patton*, 70 Ala. 626.

state or country is ancillary, though it may be prior in point of time to the principal administration. The administration here referred to includes cases of testacy and intestacy.

- 70a. In cases of testacy the person named in the will as executor may be appointed in both principal and ancillary administrations, or he may be appointed in the principal only, and another be appointed administrator *de bonis non cum testamento annexo* in the ancillary administration. In cases of intestacy, the same person, or different persons, may be appointed as principal and ancillary administrators.
71. The executor or administrator cannot, except by statutory authority, sue or be sued in his official capacity in any state except that in which he was appointed. If, therefore, he wishes to sue in such capacity in other states than the one in which he is appointed, he must procure ancillary letters in the state in which he wishes to sue, unless some statute of the latter state enables him to sue therein without ancillary appointment.

The main rule or essential point of the rules relating to administration in various jurisdictions is that the administration which is taken out in the country of domicile of the deceased is the principal or domiciliary administration. Any other administration is ancillary, whether it may or may not be prior in point of time to the administration in the domicile of the deceased.<sup>21</sup> The reason for this distinction is evident in the fact that the personal estate, which is the basis of administration, is governed by the laws of the domicile of the deceased, and all questions as to the settlement and distribution of that estate should be settled by the laws of that country or state.

The questions arising as to the administration of an estate which

<sup>21</sup> Story, Conf. Laws, § 513; *McNichol v. Eaton*, 77 Me. 249; *Lawrence v. Kitteridge*, 21 Conn. 583; *Merrill v. Insurance Co.*, 103 Mass. 248; *Fay v. Haven*, 3 Metc. (Mass.) 109; *Stevens v. Gaylord*, 11 Mass. 256.

is located in various states are often complicated and perplexing, as, for instance, the right of an executor or administrator to take out ancillary administration in other states; his right to collect the estate in other states, with or without ancillary administration; his right to pay debts in other states, including cases of insolvency; his right to distribute in other states; and his liability for assets in other states.

Though the words "principal" and "ancillary" seem to imply a relation of dependence between the several administrations, this is not the fact. Each administration is wholly independent of the other, and the executor or administrator appointed in the ancillary jurisdiction has as complete and exclusive authority therein as the one of the domicile has in the state of domicile.<sup>22</sup> Ancillary administration may be granted, although there is never any principal administration.<sup>23</sup> And in proceedings upon an application for ancillary administration, if any party relies upon the fact of there being principal administration taken out in the state or country of the domicile, he must prove this fact.<sup>24</sup>

Since ancillary administration is necessarily that of a nonresident, the taking out of such administration depends upon the existence of assets in the county where such administration is applied for, as has been seen before.<sup>25</sup> And, if there are no assets in the county where application is made, there cannot be any grant of letters. Nor will letters be granted upon petition of a nonresident creditor if there are assets, but no resident creditors, and no reason is shown why the petitioner should not prove and collect his claim in the forum of principal administration.<sup>26</sup>

There are, however, points in which the existence of the principal administration affects the ancillary administration. Thus, the principal administrator, since he represents the general creditors, heirs, and next of kin, has such an interest in the proceedings in another state that he is entitled to appear in them, and take such steps

<sup>22</sup> *Ela v. Edwards*, 13 Allen (Mass.) 48; *Merrill v. Insurance Co.*, 103 Mass. 249; *Banta v. Moore*, 15 N. J. Eq. 97; *Watts' Appeal*, 31 Leg. Int. 182.

<sup>23</sup> *Bowdoin v. Holland*, 10 Cush. (Mass.) 21.

<sup>24</sup> *Plumb v. Bateman*, 2 App. Cas. (D. C.) 156.

<sup>25</sup> *Ante*, p. 39, c. 3.

<sup>26</sup> *Washburn's Estate*, 47 N. W. 790, 45 Minn. 242; *Putnam v. Pitney*, Id.

therein as may seem suitable and legal; for example, he may appeal from a decree of a judge of probate appointing an ancillary administrator.<sup>27</sup>

There are also other points in which it has been held that the principal administration affects the ancillary administration. Thus, if the executor, having obtained appointment in the state or country of domicile, comes into another state and applies for ancillary administration, he is to be preferred to any local applicant.<sup>28</sup> So, in regard to the bond, the amount to be taken may vary, unless statutory provisions prohibit. If the principal bond covers satisfactorily all the assets of the estate, except the assets in the ancillary jurisdiction, then the ancillary bond may be in a penalty of double the amount of the ancillary assets. But if the principal bond covers all assets, the ancillary bond may be just sufficient to secure resident creditors.<sup>29</sup>

It has also been held that the rules as to the time limit within which administration may be granted do not apply to the taking out of ancillary administration.<sup>30</sup>

The principal and ancillary administrations are also distinct in regard to the assets which are to be administered in each. Each administrator is liable for, and bound to inventory and administer, all the assets of the estate of which he has knowledge, except those which lie within the jurisdiction of some other administration.<sup>31</sup> Therefore, if one who is appointed administrator in the state where the deceased resided takes ancillary administration in another state, he is not liable in the latter state, to creditors residing there, for assets in his principal administration.<sup>32</sup> Nor is he liable to creditors, as will be seen in a later section, in other states in which he

<sup>27</sup> *Smith v. Sherman*, 4 Cush. (Mass.) 408; *In re Shaw's Estate*, 16 Atl. 662, 81 Me. 207. Cf. ante, p. 126, c. 8.

<sup>28</sup> *In re Miller's Estate* (Iowa) 61 N. W. 229. Cf. ante, p. 50, c. 4.

<sup>29</sup> *In re Prout's Estate*, 27 N. E. 948, 128 N. Y. 70. Cf. post, p. 189, c. 12.

<sup>30</sup> *Henry v. Roe*, 18 S. W. 806, 83 Tex. 446. Cf. ante, p. 47, c. 3.

<sup>31</sup> *Hooker v. Olmstead*, 6 Pick. (Mass.) 481; *Fay v. Haven*, 3 Metc. (Mass.) 109; *Dawes v. Boylston*, 9 Mass. 337; *Banta v. Moore*, 15 N. J. Eq. 97. Cf. post, p. 201, c. 13.

<sup>32</sup> *Hamilton v. Carrington*, 19 S. E. 616, 41 S. C. 385; *Boston v. Boylston*, 2 Mass. 384; *Campbell v. Sheldon*, 13 Pick. (Mass.) 23; *Fay v. Haven*, 3 Metc. (Mass.) 109.

has not taken administration, into which he may bring assets.<sup>33</sup> But, if he qualifies as an ancillary administrator, he is liable to suit in the state in which he so qualifies.<sup>34</sup>

When there are assets in several states, and administrators in all of them, the assets found in each state are administered in that state.<sup>35</sup> Thus, if a creditor by simple contract debt lives and dies in one state, and the debtor lives in another, and administration is taken out in both states, the debt is assets where the debtor resides, and a payment to the administrator appointed in that state will be a good discharge everywhere.<sup>36</sup> And, if the administrator pays a debt in one state, he should be allowed the credit in his accounts, though the debt accrued in another state.<sup>37</sup>

If there is only one administration, and that is at the domicile of the testator or intestate, and there is property lying in several states, it is not improper for the executor or administrator to include this property in his inventory; and he then becomes bound to account for it in the course of his administration, since the property may be received by him without suit, and in such case he is in receipt of it as part of the estate; but if there is another administration already covering those assets, as has been said, he should not inventory them, and is not bound to account for them.<sup>38</sup> Whether assets belong in one state or in another depends upon the rules governing the locality of assets, which have already been examined in reference to deciding upon the jurisdiction of courts in case of estates of nonresidents.<sup>39</sup> The rule may here be repeated that judgment debts are assets in the state where the judgment is rendered,<sup>40</sup> specialty debts in the place where the specialty is,<sup>41</sup> and simple contract debts are assets for purposes of distribution where the debtor

<sup>33</sup> Post, p. 201, *Fugate v. Moore*, 11 S. E. 1063, 86 Va. 1045.

<sup>34</sup> *Hopper v. Hopper*, 26 N. E. 457, 125 N. Y. 400.

<sup>35</sup> *Holcomb v. Phelps*, 16 Conn. 133; *Merrill v. Insurance Co.*, 103 Mass. 248.

<sup>36</sup> *Slocum v. Sanford*, 2 Conn. 534.

<sup>37</sup> *Jones v. Warren*, 14 South. 25, 70 Miss. 227.

<sup>38</sup> *Lewis v. Groggnard*, 17 N. J. Eq. 427; *supra*, p. 154.

<sup>39</sup> Ante, p. 44, c. 3.

<sup>40</sup> *Strong v. White*, 19 Conn. 248.

<sup>41</sup> *Slocum v. Sanford*, 2 Conn. 534.

resides.<sup>42</sup> But, so far as bringing suit on the debt is concerned, the debtor may be sued in any administration into which he comes.<sup>43</sup>

In a case in Pennsylvania, where there was administration taken in Pennsylvania and New York by the same administrator, a resident of Pennsylvania, upon the estate of a resident of Pennsylvania, and there existed a mortgage on land in New Jersey, which came into the hands of the administrator in Pennsylvania, it was held that it was improper for him to carry it to the inventory of the New York property, but he should have scheduled it among the Pennsylvania estate.<sup>44</sup>

### *Suits in Different States.*

The executor or administrator cannot, except by statutory authority,<sup>45</sup> sue or be sued in his official capacity in any state except that in which he was appointed. If, therefore, he wishes to sue in other states than the one in which he is appointed, he must procure ancillary letters in the state in which he wishes to sue, unless some statute of the latter state enables him to sue therein.<sup>46</sup> This disability, arising from the lack of recognition of an appointment in one state by the courts of another, applies as well in equity as at law.<sup>47</sup> Thus, where five executors were named in the will, and three qualified in one state and two in another, and the latter brought a bill in equity in the state in which they were appointed, to which

<sup>42</sup> *Slocum v. Sanford*, 2 Conn. 534; *Hooker v. Olmstead*, 6 Pick. (Mass.) 481.

<sup>43</sup> *Merrill v. Insurance Co.*, 103 Mass. 248; *Saunders v. Weston*, 74 Me. 90.

<sup>44</sup> *Baldwin's Appeal*, 81 Pa. St. 444.

<sup>45</sup> *Craig v. Railroad Co.*, 3 Ohio Dec. 146; *Weaver v. Railroad Co.*, 21 D. C. 499. A statute which authorizes a foreign executor or administrator to recover debts due the decedent does not authorize the recovery of damages for personal injuries to the decedent. *Louisville & N. R. Co. v. Brantley's Adm'r*, 28 S. W. 477, 96 Ky. 297. That an executor or administrator cannot be sued in his official capacity out of the state of his appointment: *Laughlin v. Solomon*, 5 Pa. Dist. Ct. R. 282.

<sup>46</sup> *Story, Conf. Laws*, § 513; *Holcomb v. Phelps*, 16 Conn. 133; *Merrill v. Insurance Co.*, 103 Mass. 248; *Hutchins v. Bank*, 12 Metc. (Mass.) 421; *Farrington v. Trust Co.* (Super. N. Y.) 9 N. Y. Supp. 433; *Duchesse d'Auxy v. Porter*, 41 Fed. 68; *Crumlish's Adm'r v. Railroad Co.*, 22 S. E. 90, 40 W. Va. 627; *Black v. Henry G. Allen Co.*, 42 Fed. 618; *Marrett v. Babb's Ex'r*, 15 S. W. 4, 91 Ky. 88; *Johnson v. Powers*, 11 Sup. Ct. 525, 139 U. S. 156; *Gray v. Franks*, 49 N. W. 130, 86 Mich. 382.

<sup>47</sup> *Cassidy v. Shimmin*, 122 Mass. 412.



a plea in abatement was filed on account of the nonjoinder of the other three executors, the plea was adjudged bad, since only those who had obtained letters in the state in which suit was brought were recognized as executors.<sup>48</sup> The rule also applies as well to the federal courts as to the state courts.<sup>49</sup> The objection, being to the capacity of the plaintiff to sue, can only be taken advantage of by being pleaded in abatement. If it is not so pleaded, and judgment is recovered, the judgment will be good.<sup>50</sup> And it has been held that the defendant's ignorance of the fact that no letters have been taken out does not excuse him from availing himself of this objection, since it would not be difficult for him, by diligence, to find out whether or not such letters had been taken out.<sup>51</sup> And if the case is allowed to proceed to judgment without the interposition of this defense, and execution is issued on the judgment in favor of the foreign administrator, and is satisfied, for example, by levy on the land of the debtor, these proceedings will not be a bar to a subsequent suit on the same debt by an administrator duly appointed in the state, and the debtor is therefore in danger of being called upon to pay the same debt twice.<sup>52</sup>

In some states there are statutory provisions to the effect that a foreign executor or administrator may, by filing a copy of his letters in the clerk's office of the court in which he wishes to bring suit, be authorized to bring suit.<sup>53</sup> In some states the statute simply requires the filing of letters in any county court, in which case the letters need only be filed in one court, and that need not be the court in which suit is intended to be brought.<sup>54</sup> In other states the statutes give him the right to sue absolutely as if he had been appointed in the state.<sup>55</sup> In other states he must file his letters

<sup>48</sup> *Gilman v. Gilman*, 54 Me. 456. Cf., as to suits by joint executors, generally, post, p. 180, c. 11; *Id.* p. 443, c. 22.

<sup>49</sup> *Johnson v. Powers*, 11 Sup. Ct. 525, 139 U. S. 156.

<sup>50</sup> *Dearborn v. Mathes*, 128 Mass. 194; *Bertron v. Stuart*, 10 South. 295, 43 La. Ann. 1171.

<sup>51</sup> *James v. Morgan*, 36 Conn. 351.

<sup>52</sup> *Pond v. Makepeace*, 2 Metc. (Mass.) 114.

<sup>53</sup> See statutes of each state; *Henry v. Roe*, 18 S. W. 806, 83 Tex. 446

<sup>54</sup> See local statutes in each state; *Murray v. Norwood*, 46 N. W. 499, 77 Wis. 405.

<sup>55</sup> *Mansf. Ark. Dig.* § 4987; *Md. Rev. Code*, art. 50, § 113; *McClel. Fla. Dig.*

in some court of the county where he brings suit, and give bond to administer the amount recovered according to law.<sup>56</sup> A statutory authority to sue does not imply also an authority to be sued, nor confer upon others the power of suing the foreign executor or administrator.<sup>57</sup>

A distinction should be observed to the effect that there are cases where the executor or administrator has a personal right to sue in regard to the estate; and where this is so he may bring suit in any other state in his personal right, without procuring ancillary administration, unless some statutory bar exists.<sup>58</sup> Thus, where one received a sum of money which was due to the estate of a deceased nonresident, as agent for the administrator of that estate, the money being a sum paid over from another estate, and the foreign administrator brought suit against his agent for the money, it was held that the money being due to the administrator himself, because the cause of action arose since the death of the intestate, he could maintain the action without taking out letters in the state in which he brought suit.<sup>59</sup> So, if the administrator holds a note payable to the deceased, and indorsed by the latter in blank, the administrator can sue on it anywhere, since the title is in him; but the suit would be subject to any defense that could have been made to a suit by the deceased.<sup>60</sup> So, if a note is assigned by a foreign administrator, the assignee may sue on it anywhere.<sup>61</sup> So, if the executors have obtained judgment, and levied execution upon land, and, being thus seised, are disseised, they may bring action, declaring on their own seisin, in any state;<sup>62</sup> or, if they have obtained

p. 97, § 73; Kan. Comp. Laws, § 2648; *Arizona Cattle Co. v. Huber* (Ariz.) 33 Pac. 555; *Tittman v. Thornton*, 17 S. W. 979, 107 Mo. 500.

<sup>56</sup> N. J. Supp. Revision, "Executors," § 3; *Hayes v. Pratt*, 13 Sup. Ct. 503, 147 U. S. 557; Miss. Rev. Code, § 2091.

<sup>57</sup> *Greer v. Ferguson*, 19 S. W. 966, 56 Ark. 324. If there is a suit brought by both the foreign and resident administrators, it should be discontinued as to the foreign administrator. *Crumlish's Adm'r v. Railroad Co.*, 22 S. E. 90, 40 W. Va. 627.

<sup>58</sup> Story, Conf. Laws, §§ 516, 517. Cf. post, p. 456, c. 22.

<sup>59</sup> *Barrett v. Barrett*, 8 Me. 346.

<sup>60</sup> *Barrett v. Barrett*, 8 Me. 353.

<sup>61</sup> *Solinsky v. Bank*, 17 S. W. 1050, 82 Tex. 244.

<sup>62</sup> *Pierce v. Strickland*, 26 Me. 279.

judgment, they may sue on the judgment without taking ancillary administration.<sup>63</sup>

*Pendency of Suits in Two States.*

When suits are brought by both administrators on the same cause of action, the question arises whether the pendency of one suit can be pleaded in bar of the other, and, if so, which one. In a case in Massachusetts the facts were that the principal administration was in Illinois, and ancillary administration had been taken out by another person in Massachusetts. Both administrators brought suit on a policy of insurance on the life of the deceased. The suit in Illinois was prior in time, and both suits covered the same subject-matter. In the suit in Massachusetts the defendants pleaded the suit in Illinois in bar; but the court said that, if the Illinois administrator had had the complete title to the policy, that suit would have barred the bringing of suit in any other jurisdiction, but that as the policy had been assigned in pledge for the repayment of money, and the pledgee was the administrator in Massachusetts, the suit in Massachusetts should prevail, and the plea in bar was overruled.<sup>64</sup>

In another case it was held that an administrator who was in possession of a life insurance policy on the life of the deceased, and brought suit on it, might recover, as against the principal administrator, in another state, who did not have possession of the policy.<sup>65</sup>

**PAYMENT TO AND RECEIPT BY FOREIGN EXECUTOR OR ADMINISTRATOR A GOOD DISCHARGE.**

**72. Although an executor or administrator cannot sue in other states, yet a debtor of the estate may lawfully pay a debt or deliver property to the executor or administrator in a foreign state or country other than that in which the executor or administrator was appointed, if no local appointment has**

<sup>63</sup> Talmage v. Chapel, 16 Mass. 71.

<sup>64</sup> Merrill v. Insurance Co., 103 Mass. 245.

<sup>65</sup> New York Life Ins. Co. v. Smith, 14 C. C. A. 635, 67 Fed. 694. To same effect,—that the one having possession of the policy will prevail: Travelers' Ins. Co. of Hartford v. Grant (N. J. Ch.) 33 Atl. 1060.

been made there at the time; and such payment or receipt will be a discharge of the debtor, in case an administrator should be appointed in the state of his residence, and bring suit upon the debt.

At least, this may be said to be the prevailing modern opinion, although it is not unanimously adopted.<sup>66</sup> In some states this doubt has given rise to statutory provisions upon this subject.<sup>67</sup> If ancillary letters have been taken out in the state where the debtor resides, he must pay to the person there administering.<sup>68</sup> Payments

<sup>66</sup> *Selleck v. Rusco*, 46 Conn. 372; *Merrill v. Insurance Co.*, 103 Mass. 248; *Hutchins v. Bank*, 12 Metc. (Mass.) 248; *Story*, Conf. Laws, § 518a. See *Mecham*, Cas. Succ. p. 141. In a case in Illinois where ancillary letters had been granted, and suit begun to foreclose a mortgage, and the mortgagor paid the amount to a foreign administrator, this payment would not bar the suit. *Walker v. Welker*, 55 Ill. App. 118.

<sup>67</sup> Thus, in Alabama it is provided by statute that the foreign executor or administrator may receive property, and give a good receipt therefor, if he has complied with the requirements which would be necessary in order to enable him to sue in that state, which are filing a copy of his letters in the probate clerk's office of the county where the property is received, and giving bond to faithfully administer the property received. Code, §§ 2290, 2294. In Massachusetts an executor or administrator duly appointed in another state, or in a foreign country, and duly qualified and acting, who may be entitled to any personal property situated in this state, may, on petition to the probate court of any county, and after such notice to all persons interested as the court may order, be licensed to receive or to sell, by public or private sale, on such terms and to such person or persons as he shall think fit, or otherwise to dispose of, and to transfer and convey, any personal estate in such county, or any shares in a corporation which has an established place of business in that county, provided it appears to the court that there is no executor or administrator appointed in this commonwealth who is authorized so to receive and dispose of such shares or estate, and that such foreign executor or administrator will be liable after such receipt or sale to account for such shares or estate, or for the proceeds thereof, in the state or country where he was appointed, and also provided that no person resident in this commonwealth, and interested as a creditor or otherwise, objects to the granting of the license, or appears to be prejudiced thereby; but no such license shall be granted till the expiration of six months from the death of his testator or intestate. Pub. St. c. 142, § 3.

<sup>68</sup> *Walker v. Welker*, 55 Ill. App. 118; *Amsden v. Danielson*, 31 Atl. 4, 18 R. I. 787. But if the suit is on a specialty, as a note or bond, payment must be made to the executor or administrator who has possession of the specialty. *Amsden v. Danielson*, *supra*.

thus voluntarily made cannot be wholly applied to domiciliary debts if there are foreign debtors.<sup>69</sup>

Statutory powers are given to executors or administrators to sell personalty in various states,<sup>70</sup> or to receive and receipt for personalty received by them.<sup>71</sup> There is also sometimes a further provision by which a foreign administrator or executor may, by complying with certain preliminary requirements, be licensed to sell real estate to pay the debts of the estate.<sup>72</sup> Even without such authority a foreign administrator may execute a power of sale in a mortgage running to the deceased,<sup>73</sup> or a power of sale in the will, if he proves it in the state where he exercises the power.<sup>74</sup>

#### LIABILITY FOR ASSETS BROUGHT INTO THE STATE OF ANCILLARY ADMINISTRATION.

**73. A foreign administrator or executor is not liable in another state or country for assets which he may have brought into it from outside.**

There have been cases, of which the leading one was the case of *Campbell v. Tousey*,<sup>75</sup> in which it was held that if an executor or administrator appointed in one state goes into another, carrying assets of the estate with him, and intermeddles in the latter state with assets there, he may be held liable by creditors, not only for the local assets, but for the assets which he has brought with him into the state. This opinion has not been generally received with favor. It has been strongly controverted by Mr. Justice Story, in his book on the Conflict of Laws; and the better opinion is that he is not so liable for assets which he brings from the state in which he was appointed, nor are the assets liable if sent on by the executor

<sup>69</sup> *Jones v. Jones*, 17 S. E. 587, 39 S. C. 247.

<sup>70</sup> N. H. Gen. Laws, c. 201, § 18; Ga. Code, § 2618.

<sup>71</sup> Miss. Rev. Code, § 2091.

<sup>72</sup> *Higgins v. Reed*, 29 Pac. 389, 48 Kan. 272; N. H. Gen. Laws, c. 201, § 17; Ga. Code, § 2618; Kan. Comp. Laws, § 2588; Mass. Pub. St. c. 134, §§ 1-15; Md. Rev. Code, art. 50, §§ 114-116.

<sup>73</sup> *Thurber v. Carpenter*, 31 Atl. 5, 15 R. I. 782.

<sup>74</sup> *Babcock v. Collins*, 61 N. W. 1020, 60 Minn. 73.

<sup>75</sup> 7 Cow. (N. Y.) 64.

without following them himself, and that creditors, if they wish to pursue these assets, must either resort to the principal administration, or procure letters on the estate, and then proceed against the other administrator as executor de son tort.<sup>76</sup> This question was raised in a recent case,<sup>77</sup> and the opinion above stated affirmed as the law of Connecticut, and at the same time a distinction drawn between assets collected by the executor in such state and assets brought into that state from the state of principal administration; the court holding that the latter were already under the jurisdiction of the courts of the state of principal administration, and that then no other court would interfere to take jurisdiction, while, in the case of assets collected by him in a state other than that in which he was appointed, these assets were not under the special jurisdiction of any court, and creditors of that state might proceed against them, or against the executor as executor.<sup>78</sup>

#### IN WHAT STATE SUIT IS TO BE BROUGHT.

**74. Suits on simple contract debts may be brought in any state in which there is administration and in which the debtor is found or resides. On specialties suit must be brought by the administrator in whose state the specialty is found.**

Each administrator can sue only on claims which properly belong to the estate which is within his jurisdiction. A simple contract debt due to the estate may be sued on in any state in which there is administration, and in which the debtor is found or resides.<sup>79</sup> In regard to specialties, however, suit must be brought by the administrator in whose state the specialty is found at the death of the decedent, since specialties are assets in the place where they are found. Thus, when a policy of insurance on the life of the intestate was sued upon in two states by two administrators, it was held

<sup>76</sup> Story, Conf. Laws, §§ 513, 514b; *Campbell v. Sheldon*, 13 Pick. (Mass.) 8. To same effect: *Collins v. Steuart* (Sup.) 37 N. Y. Supp. 891.

<sup>77</sup> *Hedenberg v. Hedenberg*, 46 Conn. 30.

<sup>78</sup> *Marcy v. Marcy*, 32 Conn. 308.

<sup>79</sup> *Merrill v. Insurance Co.*, 103 Mass. 248; *Hooker v. Olmstead*, 6 Pick. (Mass.) 481.

that the suit brought by the administrator who had possession of the policy should prevail.<sup>80</sup>

# PAYMENT OF DEBTS GOVERNED BY LAW OF FORUM.

75. The payment of debts is governed by the law of the state in which the administration is being had; and in cases of insolvency the laws of that state govern the payment of debts, unless some different provision is made by statute.

The general rule as to the payment of debts in the course of administration is that the law of the forum governs, even when the estate is insolvent.<sup>81</sup> This rule is based upon the general principle that courts will administer the laws of their own country, and not those of any other. An important result of this rule is that in case preferences are allowed in one state, and not in another, the assets of the estate will be distributed according to the rule obtaining in that state in which they are administered, and not according to the rule in any other state, even though it may be the state where the decedent resided at the time of his death, and which is therefore the state of domicile.<sup>82</sup>

Where the assets are sufficient to pay the debts of the estate, few questions arise; but cases may arise where the assets in one state are in excess of the debts, while assets in another are insufficient to meet the debts proved in that state, or where the personal estate is insufficient, and application is made for leave to sell the real estate. It has been said that the condition of the whole estate should be looked at, so far as it is known, in all states, and the decisions should be based upon that condition.<sup>83</sup> Thus, where a statute provided that if the estate was insolvent the executor or administrator might have an action of waste against the heirs for impairing the value of the real estate, by selling or otherwise, it was held that the solvency or insolvency could only be determined at the place of principal administration,—that is, the residence of the deceased,—and that the

<sup>80</sup> Merrill v. Insurance Co., 103 Mass. 251.

<sup>81</sup> Story, Conf. Laws, § 524; De Sobry v. De Laistre, 2 Har. & J. (Md.) 191.

<sup>82</sup> Varnum v. Camp, 13 N. J. Law, 333; Smith v. President, etc., 5 Pet. 518.

<sup>83</sup> Dawes v. Head, 3 Pick. (Mass.) 128. Cf. post, p. 342, c. 17.

fact that the assets in one state where ancillary administration was taken out were not sufficient to pay the debts in that state did not constitute insolvency of the estate. It is to be observed, however, that the question in this case was, not whether the estate should be put into insolvency, but whether there was such an insolvency as justified the administrator in bringing an action of waste against the heirs under the above statute, and it was held that there was not; the court saying that although the administrator was not bound to look the world over for the assets, yet he had no right to declare the estate insolvent until he at least knew what the assets and debts at the place of principal administration were.<sup>84</sup> In another case the question was whether creditors in the state of ancillary administration might have leave to sell real estate to pay debts; the personal estate in the state of ancillary administration being insufficient for that purpose, but the general assets in the place of principal administration being in excess of the debts there proved. The application was refused on these principles, stated by Mr. Chief Justice Shaw: "In all the states of the United States it must be presumed that all debts—as well those due to citizens of other states as those due to citizens of the same state—are to be paid out of the general assets before they can be applied to the payment of legacies. Indeed, the constitution of the United States guaranties to citizens of each state the rights and privileges of citizens of all other states, amongst which may be reckoned that of proving claims and recovering debts against a deceased person in the due course of administration. Where there is an ample fund provided for the payment of debts in another state, to which, for aught that appears, the creditors could resort and obtain the payment of their debts, no license ought to be granted to sell real estate in this commonwealth, and thus disinherit the heirs,—at least, until it is shown that the creditors have used some diligence to collect their debts in the foreign state, and have met with some legal impediment in obtaining them."<sup>85</sup> No case is known to have decided whether the same principle would apply in cases where the executor or administrator endeavors to have the estate put into insolvency, on the ground that

<sup>84</sup> *McNichol v. Eaton*, 77 Me. 248.

<sup>85</sup> *Livermore v. Haven*, 23 Pick. (Mass.) 118.



the assets in his state are insufficient to pay debts, if it is shown that the assets elsewhere are sufficient. As such proceedings do not affect the right of heirs, perhaps the courts would allow the application, although if this rule were adopted perplexing cases might arise where there was real estate enough to render the estate solvent, and yet the court would be bound by the decision above stated to deny an application for the sale of real estate, and the curious result would be found of an estate which was actually solvent being put into insolvency. Still it is difficult to see how the executor or administrator can be made responsible for assets over which he has no control, and probably this fact would lead the courts to allow proceedings to commence. In an early case in Massachusetts the facts were that the deceased resided in Vermont, and principal administration was there taken, and the estate was represented insolvent, commissioners appointed, and claims allowed to an amount in excess of the value of the estate, real and personal. Ancillary administration was taken out in Massachusetts by the Vermont administrators for the purpose of selling real estate belonging to the estate in Massachusetts. No commission of insolvency was issued in Massachusetts, and the property in that state exceeded the debts. A creditor of the deceased residing in Massachusetts brought suit against the administrators in Massachusetts, and the court allowed him to recover the full amount of his debt, but ordered no execution to issue, and the administrators to pay only so much on the judgment as would give the creditor a pro rata payment with the Vermont creditors; the court saying, "As the estate is insolvent, a creditor here is not to be paid his whole debt, to the prejudice of creditors in Vermont, but only a pro rata dividend."<sup>86</sup>

In order to insure equality, however, there are in many states statutes which provide for the distribution of the assets among the creditors, resident and nonresident, alike. Thus, in Massachusetts and Maine it is provided by statute that if the estate is insolvent the distribution shall be made so as to give all creditors, foreign and domestic, an equal, proportionate share. To accomplish this object, it is provided that the estate shall not be transmitted to the foreign executor or administrator, nor shall any foreign creditor be

<sup>86</sup> Davis v. Estey, 8 Pick. (Mass.) 475.

paid until all creditors, citizens of that commonwealth, have received the share to which they would be entitled if the whole estate of the deceased, wherever found, were divided among all creditors in proportion to their respective debts, without any preferences.<sup>87</sup> If there is any residue left after paying the citizens of this commonwealth, such residue may be paid (in the same proportion) to any foreign creditors who have proved their claims in this state, or may be transmitted to the foreign executor or administrator; or, if there is none, it shall, after four years from the appointment of the administrator, be distributed ratably among all creditors who have proved their claims in this commonwealth.<sup>88</sup> In New Hampshire there is a statute providing that if a certified list of claims against the estate, proved in another state, is given to the court in New Hampshire, it will make distribution on the basis of all the claims together, if the same principle is allowed in the other state.<sup>89</sup> In Vermont the statute merely states that the estate shall be distributed so as to give an equal share, as far as possible, to creditors in both states.<sup>90</sup> And, in order to do this, claims proved against the estate, in another state shall be added by the judge to those proved in Vermont.<sup>91</sup> Even in the absence of statutes, the assets of each state are liable, not only to the claims of creditors residing in the state, but to claims of all nonresident creditors who appear and prove their claims.<sup>92</sup> It was held in a recent case, where all claims against the estate in the ancillary administration had been paid, that the balance should be remitted to the principal administrator, to settle claims in that jurisdiction.<sup>93</sup>

<sup>87</sup> Mass. Pub. St. c. 138, §§ 3, 4.

<sup>88</sup> Mass. Pub. St. c. 138, § 5; Me. Rev. St. c. 65, §§ 37, 38.

<sup>89</sup> N. H. Gen. Laws, c. 199, §§ 26-28.

<sup>90</sup> Vt. R. L. § 2192.

<sup>91</sup> Vt. R. L. § 2193.

<sup>92</sup> *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191.

<sup>93</sup> *Hamilton v. Levy*, 19 S. E. 610, 41 S. C. 374. Cf. post, p. 304, c. 17.

### DISTRIBUTION OF ESTATE AMONG LEGATEES AND DISTRIBUTEES.

76. If the assets in the ancillary administration are not exhausted by the payment of debts, they may be remitted to the place of principal administration, or distribution of the estate among the persons entitled to succeed to it may be made by the ancillary administrator as if his administration was independent.

The interdependence of the two kinds of administration—principal and ancillary—is shown more clearly in the distribution of the assets of the estate than in any other proceeding. If the ancillary assets are more than enough to pay debts, they may either be sent to the place of principal administration, or distributed in the ancillary administration.<sup>94</sup> Which of these two courses should be adopted is entirely in the discretion of the court, guided by the facts of the case. If all the distributees live in the state of principal administration, or near it, it is proper to avoid the expense and possible confusion of two distributions by sending the money to the principal administrator for distribution, but the rights of distributees in the state of ancillary administration should be looked after.<sup>95</sup> In a case in New York the will of a resident of California contained bequests of leasehold property in New York. The bequests were void, as to the law of New York, as being against the rule against perpetuities and accumulations, but valid according to the law of California. The court stated that it would not directly aid in carrying out a bequest which was in violation of the statute law of the state, and of a policy favored by the courts, nor would it hold the bequest void, since

<sup>94</sup> Story, Conf. Laws, § 513; *Lawrence v. Kitteridge*, 21 Conn. 581; *Stevens v. Gaylord*, 11 Mass. 256; *Lewis v. Grogard*, 17 N. J. Eq. 428; *Parsons v. Lyman*, 20 N. Y. 103; *Harvey v. Richards*, Fed. Cas. No. 6,184, 1 Mason, 381-407; *Succession of Gaines*, 14 South. 602, 46 La. Ann. 252; *In re Braithwaite*, 19 Abb. N. C. (N. Y.) 113.

<sup>95</sup> *Hayes v. Pratt*, 13 Sup. Ct. 503, 147 U. S. 557; *Lawrence v. Kitteridge*, 21 Conn. 581; *Lewis v. Grogard*, 17 N. J. Eq. 428; *Harvey v. Richards*, Fed. Cas. No. 6,184, 1 Mason, 381; *Isham v. Gibbons*, 1 Bradf. (N. Y.) 70; *Parsons v. Lyman*, 4 Bradf. (N. Y.) 268.

it was valid by the law of California, and, being of personal property, was governed by that law. There being no creditors in New York, the court directed certain legacies payable to legatees living in various Atlantic states to be paid to them out of the assets, and the remainder of the assets to be remitted to California, to be there administered.<sup>96</sup> In Pennsylvania the courts have gone so far as to establish the rule that the balance must in no case be transmitted to the principal administrator when there are resident legatees or distributees in the jurisdiction in which the fund is, and in a recent case this rule was said to be too firmly settled by authority to be departed from or doubted. In that case it appeared that there were no creditors in the state where principal administration was had, so that the only question was whether distribution should be had in the one state or the other.<sup>97</sup> In either case, however, the law of the domicile of the deceased, as has been already shown, decides who are entitled to share in distribution.<sup>98</sup> And there is no power in the courts of one state to compel the administrator or executor appointed in another state to remit the balance existing in his hands after the payment of debts to the state of the principal domicile for distribution. Yet, if he does so by order of the court in which he is settling the estate, his action is valid, and he will be protected in so doing.<sup>99</sup>

#### EFFECT OF ACCOUNTS RENDERED IN DIFFERENT STATES.

**77. Accounts settled and allowed by the court in one state cannot be disputed in another state. Claims allowed by the court in one state cannot be disputed in another state, so far as their allowance**

<sup>96</sup> *Despard v. Churchill*, 53 N. Y. 192. In New York the statutes limit the powers of ancillary administrators over the property to paying creditors in the state, and transmitting the property to the principal and administrator, and the ancillary administrator cannot pledge the property. *Smith v. Bank*, 24 N. Y. Supp. 419, 70 Hun, 357.

<sup>97</sup> *Parker's Appeal*, 61 Pa. St. 484; *Dent's Appeal*, 22 Pa. St. 520; *In re Welles' Estate*, 28 Atl. 1116, 1117, 161 Pa. St. 218, 224; *Mothland v. Wireman*, 3 Pen. & W. 188. See, also, *In re Weaver's Estate*, 4 Pa. Dist. R. 260.

<sup>98</sup> *Ante*, p. 151.

<sup>99</sup> *Freeman's Appeal*, 68 Pa. St. 151; *Lewis v. Groggnard*, 17 N. J. Eq. 428.

against the assets in the former state is concerned, but may be disputed if advanced against assets in the latter state.

If the administration account is closed in either state, the correctness of that account cannot be disputed in the other state, the courts being bound by the decree of a sister state.<sup>100</sup> But if foreign creditors resort to the forum of principal administration, and their claims are rejected, there being at the time no ancillary administration, they may still enforce their claims when administration has been taken out in their own state.<sup>101</sup> And the settlement of the account in the ancillary jurisdiction is not conclusive upon claims against the estate in settling the accounts in the principal administration, or vice versa. Thus, if a claim against the estate in favor of the executor is proved in the ancillary administration, and allowed in the administration accounts there, and is so large as not to be satisfied by the assets in that state, and the executor consequently enters in his accounts in the principal administration an item of balance due him on the ancillary administration accounts, the item may be contested, and the allowance of the claim in the ancillary administration is not conclusive, but the merits of the claim may be investigated.<sup>102</sup> The settlement of the accounts in the ancillary administration is, however, conclusive, so far as the assets in that jurisdiction are concerned, and the validity of debts paid there, and the legality of the payments, and allowing of the statement of assets, and everything else which concerns the ancillary administration only.<sup>103</sup>

The relation of an ancillary administrator to the principal administrator was discussed in a case in Massachusetts.<sup>104</sup> The facts of this case were that the testator was a resident of Maine, and died in Kittery, in that state. His will was proved there, and the defendants were appointed and qualified as executors. The defendants were residents of Massachusetts, and procured ancillary administration in that state, proving the will as allowed by the statutes of

<sup>100</sup> *Holcomb v. Phelps*, 16 Conn. 132, 133.

<sup>101</sup> *Lawrence's Appeal*, 49 Conn. 424.

<sup>102</sup> *Ela v. Edwards*, 13 Allen (Mass.) 49.

<sup>103</sup> *Clark v. Blackington*, 110 Mass. 373. Cf. post, p. 403, c. 20.

<sup>104</sup> *Emery v. Batchelder*, 132 Mass. 452.

that state, and, after settling the estate in Massachusetts, filed a final account of the ancillary administration, in which they credited themselves with having paid the balance thereof to themselves as executors in Maine. The plaintiff was a legatee under the will, to whom an annuity was given, and brought a bill in equity in Massachusetts after the filing of the above-mentioned account, asking that the defendants, as executors, reserve a fund sufficient to pay her annuity. The assets in Maine were insufficient to pay all legacies in full. The court held that by filing the account the executors had settled the ancillary administration, and that, as executors in Maine, they were not liable in Massachusetts, or anywhere outside the jurisdiction in which they were appointed, and that the court could not enforce the trust, although the executors resided in the state in which suit was brought. The court expressly avoided the question whether, if the ancillary executorship had still been open, they would have entertained jurisdiction of the bill, involving as it would the rights of all the other legatees, and the marshaling and distribution of the whole estate.

*Laws of Other States must be Proved as Facts.*

It may be noticed, in passing, that if it becomes necessary, in any legal proceedings, to rely upon the law of another state or country, that law must be proved as a matter of fact, and will not be judicially noticed;<sup>105</sup> and this proof should be made to the tribunal which tries the facts of the case, whether it is judge or jury, and the conclusion of this tribunal upon the law of the foreign state is a finding of fact, and not examinable upon exceptions any more than other findings of fact.<sup>106</sup> The law of a foreign state or country may be proved by the statutes, the reports of cases, or the testimony of experts.<sup>107</sup>

<sup>105</sup> 1 Greenl. Ev. (15th Ed.) § 5; *Davis v. Railroad Co.*, 9 N. E. 815, 143 Mass. 302; *Hazelton v. Valentine*, 113 Mass. 472, 478.

<sup>106</sup> *Ames v. McCamber*, 124 Mass. 91; *Inhabitants of Sheffield v. Inhabitants of Otis*, 107 Mass. 282.

<sup>107</sup> *The Pawashick*, Fed. Cas. No. 10,851, 2 Low. 142; *Spaulding v. Vincent*, 24 Vt. 501; 1 Greenl. Ev. (14th Ed.) 488, 489; Mass. Pub. St. c. 169, § 71; *Ashley v. Root*, 4 Allen (Mass.) 504.

## CHAPTER XI.

### JOINT EXECUTORS AND ADMINISTRATORS.

- 78. Nature of the Estate of Joint Executors or Administrators.
- 79. One Executor or Administrator may Act Alone.
- 80. Liability for Acts of Others.
- 81. Suits between Executors or Administrators.
- 82. Remedy in Probate Court.

### NATURE OF THE ESTATE OF JOINT EXECUTORS OR ADMINISTRATORS.

78. The interest of two or more joint executors or administrators in the estate over which they are appointed is joint and entire, and the executors or administrators are considered as one individual. Each of the executors or administrators is entitled to the possession of all the personal property, and, if one has actual possession of any of the personal estate, he is entitled to retain it, as against his co-executor or co-administrator.

The nature of the interest of the executors or administrators in the property is, in the United States, somewhat different from the English law; for in the United States these officers are rather in the nature of trustees than owners of the estate which they administer. Still the English rule applies, that in case of two or more executors or administrators the interest is joint and entire;<sup>1</sup> each being entitled to the possession of the whole of the estate, and being entitled to retain that portion which comes into his possession, even as against his co-executors or co-administrators.<sup>2</sup>

This interest is also of such a nature that no partition can be made among the several executors or administrators; for each owns the whole, thereby differing from ordinary joint tenants, who own

<sup>1</sup> Dyer, 23b; 3 Bac. Abr. 30, tit. "Executors," D, 1; Gilman v. Healy, 55 Me. 120.

<sup>2</sup> Edmonds v. Crenshaw, 14 Pet. 166; Burt v. Burt, 41 N. Y. 51.

only a partial interest, although possessed jointly.<sup>3</sup> And, since each of the joint executors or administrators owns the whole interest in the personal property, it follows that, if either grants his share in the estate to a third person, he grants the whole estate.<sup>4</sup> So, if one releases his interest to the other, nothing passes, because both owned the whole before.<sup>5</sup> While, however, the interest is different in the above respect from the ordinary interest of joint tenants, yet it is in other respects like that interest. The rule as to survivorship among the joint tenants applies to the interests of joint executors and administrators, and, if either dies, his interest passes to the survivor or survivors, without any new grant.<sup>6</sup> This rule of survivorship was of great importance when the executor was entitled to the estate after paying debts and legacies; for if there were several executors, and one of them died before the joint interest was severed, the others took the whole beneficial interest, to the exclusion of his executors and administrators.<sup>7</sup>

Since the executors and administrators are thus considered as one individual, if one of them takes possession of the estate, or any portion thereof, that possession inures to the benefit of all; and, if the goods are afterwards taken away, an action may be brought by all for the tort.<sup>8</sup> As will be seen later, it is necessary that all joint executors or administrators should join in suits, as a general rule.<sup>9</sup> But in cases of contracts relating to the estate the action must be governed by the parties to the contract, and the rule is that contracts which were made with the deceased must be sued or de-

<sup>3</sup> Dyer, 23b, in margin; Godol. pt. 2, c. 16, § 2.

<sup>4</sup> Dyer, 23b, in margin; Godol. pt. 2, c. 16, § 2. See, also, Abb. Desc. Wills & Adm. § 168.

<sup>5</sup> Godol. pt. 2, c. 16, § 1.

<sup>6</sup> Nation v. Tozer, 1 Crompton, M. & R. 174, per Parke, B. Nor does the fact that the probate court appoints an administrator d. b. n. c. t. a. in place of the dead executor revoke the letters of the surviving executor. Packer v. Owens, 30 Atl. 314, 164 Pa. St. 185.

<sup>7</sup> Frewen v. Relfe, 2 Brown, Ch. 220; Griffiths v. Hamilton, 12 Ves. 298; Knight v. Gould, 2 Mylne & K. 295.

<sup>8</sup> Nation v. Tozer, 1 Crompton, M. & R. 174. Cf. post, p. 454, c. 22.

<sup>9</sup> Post, p. 457, c. 22. But one of two executors may proceed in court if any valid reason exists for not joining the other. Hattersley v. Bissett (N. J. Ch.) 30 Atl. 86.



fended by all the executors or administrators, since all of them, collectively, represent the deceased, and not any of them individually,<sup>10</sup> while those which have been made by the executors or administrators subsequently to assuming their offices depend upon the parties to the contract; and, if the contract is made with one of the executors or administrators alone, he alone should sue and defend it, since such contracts do not bind the estate, but only the executors or administrators personally.<sup>11</sup> If two executors recover judgment on a mortgage due their testator, and one of them dies, the survivor has the right to receive payment of the judgment, and to satisfy it.<sup>12</sup> But if several administrators, plaintiffs, compel defendant in a suit to give bond to respond to the judgment, one of them cannot extend the time, or otherwise change the conditions of the bond so as to discharge the surety.<sup>13</sup>

Different circumstances may control the actual possession of the estate. Each executor or administrator is entitled to the actual possession of the whole estate.<sup>14</sup> If one executor or administrator secures the possession, and is ready to produce it on all occasions when it is necessary for the proper settlement of the estate,—such as producing a note or mortgage when money is paid upon it, in order that it may be indorsed or canceled,—the other executor or administrator cannot complain, although he is denied access to the strong box or place where such estate is kept.<sup>15</sup> But, of course, if there is any fraud, or the interests of creditors or beneficiaries are endangered, the court of equity or the probate court would entertain an application by one executor to have the estate delivered to him by the other.<sup>16</sup>

<sup>10</sup> Godol. pt. 2, c. 16, § 1; *Brassington v. Ault*, 2 Bing. 177; *Heath v. Chilton*, 12 Mees. & W. 632. Cf. post, p. 457, c. 22; *Id.* p. 485, c. 23.

<sup>11</sup> *Sumner v. Williams*, 8 Mass. 162. Cf. post, p. 457, c. 22.

<sup>12</sup> *Packer v. Owens*, 30 Atl. 314, 164 Pa. St. 185.

<sup>13</sup> *Jordan v. Spiers*, 18 S. E. 327, 113 N. C. 344.

<sup>14</sup> *Edmonds v. Crenshaw*, 14 Pet. 163; *Burt v. Burt*, 41 N. Y. 51.

<sup>15</sup> *Burt v. Burt*, 41 N. Y. 51.

<sup>16</sup> *Wood v. Brown*, 34 N. Y. 337; *Burt v. Burt*, 41 N. Y. 51.

## ONE EXECUTOR OR ADMINISTRATOR MAY ACT ALONE.

79. As the executors or administrators are regarded as one person, any one may act alone in regard to the personal estate in all acts in pais. The administration of the estate may therefore be wholly carried on by one, and he may perform all the acts necessary to such administration.

The power of one executor or administrator to act for all extends to acts in pais only.<sup>17</sup>

Thus, one of several co-executors or co-administrators may assign or sell a promissory note payable to the testator,<sup>18</sup> but not one payable to both of two executors, as executors, for a debt of the testator.<sup>19</sup> But it is held that one of two administrators may indorse a note payable to both.<sup>20</sup> So one may release a debt due to the estate,<sup>21</sup> or he may receive money due on a promissory note, and give a valid receipt and discharge therefor.<sup>22</sup> So one may release a claim of the estate against a person, so as to destroy his interest in the estate and enable him to be a competent witness.<sup>23</sup> So one of several co-executors or co-administrators may settle an account with one who has had dealings with the estate,<sup>24</sup> or, if the executors or administrators are authorized by the probate court to compromise claims, one of them may compromise the claim, and give a discharge in full of the claim, without the assent of the other, since the statute

<sup>17</sup> Went. Off. Ex'r, 206; *Ex parte Rigby*, 19 Ves. 462; *Lank v. Kinder*, 4 Har. (Del.) 457; *Jackson v. Shaffer*, 11 Johns. (N. Y.) 513; *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34; *Kerr v. Waters*, 19 Ga. 136; *Beecher v. Buckingham*, 18 Conn. 121.

<sup>18</sup> *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34; *Beecher v. Buckingham*, 18 Conn. 121; *Dwight v. Newell*, 15 Ill. 333.

<sup>19</sup> *Smith v. Whiting*, 9 Mass. 334.

<sup>20</sup> *Mackay v. St. Mary's Church*, 23 Atl. 108, 15 R. I. 121.

<sup>21</sup> *Dyer*, 23b, in margin; *Jacomb v. Harwood*, 2 Ves. Sr. 267; *Shaw v. Berry*, 35 Me. 279; *Gilman v. Healy*, 55 Me. 120; *Stuyvesant v. Hall*, 2 Barb. Ch. (N. Y.) 151; *Devling v. Little*, 26 Pa. St. 502; *Shreve v. Joyce*, 36 N. J. Law, 48.

<sup>22</sup> *Beecher v. Buckingham*, 18 Conn. 121.

<sup>23</sup> *Shaw v. Berry*, 35 Me. 280.

<sup>24</sup> *Smith v. Everett*, 27 Beav. 446.

giving the probate court power to authorize the executors or administrators to compromise claims does not add any new power to those already belonging to the office, but merely provides a sanction and protection for the executors or administrators in the exercise of their common-law power of compromising claims.<sup>25</sup> So one of several executors may make a sale of a part of the estate, or give it away, and it is a valid sale or gift.<sup>26</sup> On the same principle, it is held that one of several executors or administrators may assign or release a mortgage.<sup>27</sup> But as an executor or administrator cannot put any new obligation upon the estate, except in rare instances, where the consideration arose during the lifetime of the decedent, but can only bind himself personally, he cannot bind his co-executors or co-administrators by any contract he may make, without some assent or ratification on their part. Thus, if he borrows money for the estate, he alone is responsible, and neither the estate nor his co-executors or co-administrators are liable.<sup>28</sup> As to proceedings at law, these will be considered later; but it may be remarked that one of several executors or administrators defendant cannot confess judgment, or otherwise dispose of the case, to the prejudice of his co-executors or co-administrators who may wish to plead different pleas.<sup>29</sup> In Texas it is provided by statute that the acts of one executor shall be valid, as if all had joined therein, except in conveyances of real estate, and under this statute it is held that letters of one executor about the sale of real estate are admissible against the estate.<sup>30</sup>

<sup>25</sup> *Gilman v. Healy*, 55 Me. 124.

<sup>26</sup> *Kelsock v. Nicholson*, Cro. Eliz. 478, 496; *Beecher v. Buckingham*, 18 Conn. 121; *Geyer v. Snyder*, 35 N. E. 784, 140 N. Y. 394.

<sup>27</sup> *Murray v. Blatchford*, 1 Wend. (N. Y.) 583; *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 24; *Bogert v. Hertell*, 4 Hill (N. Y.) 492; *George v. Baker*, 3 Allen (Mass.) 326, note. But this power of one to act for all terminates after a final account and discharge. *Earle v. McGoldrick*, 36 N. Y. Supp. 803, 15 Misc. Rep. 135.

<sup>28</sup> *Bryan v. Stewart*, 83 N. Y. 272. Cf. post, p. 457, c. 22. And so, if he contracts on behalf of himself and his co-executor to buy land, he will bind only himself. *Wilson v. Mason* (Ill. Sup.) 42 N. E. 134. So if he tries to mortgage the estate. *Carr v. Hertz* (N. J. Ch.) 33 Atl. 194.

<sup>29</sup> *Shreve v. Joyce*, 36 N. J. Law, 49; *Elwell v. Quash*, Strange, 20. Cf. post, p. 485, c. 23.

<sup>30</sup> *Armstrong v. O'Brien*, 19 S. W. 268, 83 Tex. 635.

*Sales of Land by Co-Executors.*

The power of executors and administrators in regard to sales of lands will be discussed later;<sup>31</sup> but it may here be said that, if one of several who are appointed executors by the testator refuses to accept the office, a power of sale of lands given to the executors may be exercised by those who accept the trust and qualify.<sup>32</sup> If all accept and qualify, and one dies, the others may execute the power; and the same is true of a sole surviving executor, although the power was given to executors in the plural number.<sup>33</sup> Ordinarily, if all the executors die, resign, renounce, or are removed, such a power does not go to an administrator de bonis non, unless such provision is made by statute, as it is in many states.<sup>34</sup> Thus, in New York, where a statute provides that such administrators shall have the same rights and powers, and be subject to the same duties, as if they had been named executors in the will, it is held that all duties which belong distinctively to the office of the executors as such, and not as a trustee, devolve upon such an administrator; but where the will gives a power to the executor in a capacity distinctly different from his duties as executor, so that as to such duties he is to be regarded wholly as a trustee, and not at all as an executor, or where the power granted implies a personal confidence reposed in the individual over and above that which is ordinarily implied in the selection of an executor, the power does not pass to the administrator. An imperative power to sell real estate to pay debts and legacies is of the former kind, and devolves upon the administrator.<sup>35</sup>

<sup>31</sup> Post, p. 280, c. 16.

<sup>32</sup> *Shelton v. Homer*, 5 Metc. (Mass.) 466, 467; *Corlies v. Little*, 14 N. J. Law, 373; *Leggett v. Hunter*, 19 N. Y. 445; *Zebach v. Smith*, 3 Bin. (Pa.) 69; *Wolfe v. Hines*, 20 S. E. 322, 93 Ga. 329.

<sup>33</sup> *Herrick v. Carpenter*, 52 N. W. 747, 92 Mich. 440; *Co. Litt.* 113a; *Houell v. Barnes*, Cro. Car. 382; *Milward v. Moore*, Sav. 72; *Mott v. Ackerman*, 92 N. Y. 551. Contra: *McRae v. Farrow*, 4 Hen. & M. (Va.) 444; *Kling v. Hummer*, 2 Pen. & W. (Pa.) 349. See *Digges v. Jarman*, 4 Har. & Mc. H. (Md.) 485.

<sup>34</sup> Post, p. 282, c. 16.

<sup>35</sup> *Mott v. Ackerman*, 92 N. Y. 553.

## LIABILITY FOR ACTS OF OTHERS.

**80.** The liability of joint executors and administrators at common law is limited to such portion of the estate as has come into their possession, or for acts of negligence or fraud of the co-executor or co-administrator which he knew of and assented to. This liability is extended in case all sign a joint bond, and the liability of each is then for the due administration of the whole estate.

The liability of one of several co-executors or co-administrators, unless extended by a joint bond, is limited to that portion of the estate which is in his possession, or which, having once been in his possession, he has allowed to go into the possession of his co-executor or co-administrator, or for acts of negligence or fraud of his companions which he knew of and assented to.<sup>36</sup> For assets which have never been in his possession he is not liable,<sup>37</sup> unless the co-executors or co-administrators have executed a joint bond, in which case each is responsible for the proper administration of the estate.<sup>38</sup> But they may avoid this liability by giving separate bonds,

<sup>36</sup> *Peter v. Beverly*, 10 Pet. 532; *Edmonds v. Crenshaw*, 14 Pet. 166; *In re Rennie's Estate*, 32 N. Y. Supp. 225, 10 Misc. Rep. 638; *McDonald v. Hanna*, 59 N. W. 171, 100 Mich. 412; *Cocks v. Haviland*, 26 N. E. 976, 124 N. Y. 426; *Insley v. Shire*, 39 Pac. 713, 54 Kan. 793; *Whiddon v. Williams* (Ga.) 24 S. E. 437; *Sparhawk v. Buell*, 9 Vt. 41; *Croft v. Williams*, 88 N. Y., 388; *Gladius v. Fogel*, 88 N. Y. 442; *Ormiston v. Olcott*, 84 N. Y. 346; *Sutherland v. Brush*, 7 Johns. Ch. (N. Y.) 17; *Fennimore v. Fennimore*, 3 N. J. Eq. 292; *Fisher v. Skillman's Ex'rs*, 18 N. J. Eq. 229; *Brazier v. Clark*, 5 Pick. (Mass.) 103; *Ames v. Armstrong*, 106 Mass. 18. For property once in his possession, which he has turned over to co-executor, see *Thompson v. Hicks*, 37 N. Y. Supp. 340, 1 App. Div. 275. For joint conveyances, both are responsible. *Bechtold v. Read* (N. J. Ch.) 32 Atl. 694.

<sup>37</sup> *Douglass v. Satterlee*, 11 Johns. (N. Y.) 16; *Williams v. Holden*, 4 Wend. (N. Y.) 223.

<sup>38</sup> *Knapp v. Hanford*, 7 Conn. 138; *Babcock v. Hubbard*, 2 Conn. 536; *Lancaster v. Lewis*, 21 S. E. 155, 93 Ga. 727; *Towne v. Ammidown*, 20 Pick. (Mass.) 538; *Brazier v. Clark*, 5 Pick. (Mass.) 104; *Ames v. Armstrong*, 106 Mass. 15.

in which case the liability becomes the same as has been stated to be their liability at common law.<sup>39</sup>

When the bond is joint, and an executor dies before breach, his representatives are not liable for an after-occurring breach by the other,<sup>40</sup> although they are liable for a breach occurring before his death.<sup>41</sup> If an executor resigns or is removed, he is not liable on his bond for a breach by the other occurring after such resignation or removal.<sup>42</sup>

As each executor or administrator has the right to the possession of the whole estate,<sup>43</sup> the mere fact that an executor or administrator allows another to take possession of the estate, and the latter subsequently misapplies it and wastes it, does not render the former liable for such misapplication. There must be a knowledge of and concurrence in such misapplication, in order to render him liable,<sup>44</sup> or an agreement that the assets should be taken by the one who misapplies them.<sup>45</sup> There has, however, been a noticeable tendency in the later decisions to extend this liability, the courts holding that there may be circumstances which render one executor or administrator liable for merely allowing the other to receive the estate. For instance, if the executor who is about to receive the estate is intending to waste it, and this intention is known to the other, the latter is liable for the former's misapplication; but the mere fact that the executor who is about to receive the property is poor, or even insolvent, does not render the other liable for allowing him to receive it.<sup>46</sup> It has been said that if one executor is an active business man, familiar with the value of property, and accustomed

<sup>39</sup> *McKim v. Aulbach*, 130 Mass. 481. The fact that they file a joint final account is not conclusive evidence that they are jointly liable for the sum found due therein. *Weyman v. Thompson*, 30 Atl. 249, 52 N. J. Eq. 263.

<sup>40</sup> *Towne v. Ammidown*, 20 Pick. (Mass.) 538; *Brazer v. Clark*, 5 Pick. (Mass.) 104.

<sup>41</sup> *Brazer v. Clark*, 5 Pick. (Mass.) 104.

<sup>42</sup> *Brazer v. Clark*, 5 Pick. (Mass.) 104.

<sup>43</sup> *Edmonds v. Crenshaw*, 14 Pet. 166; ante, p. 171.

<sup>44</sup> *Peter v. Beverly*, 10 Pet. 532, 562; *Croft v. Williams*, 88 N. Y. 388; *Sutherland v. Brush*, 7 Johns. Ch. (N. Y.) 17; *Adair v. Brimmer*, 74 N. Y. 566.

<sup>45</sup> *Ames v. Armstrong*, 106 Mass. 15; *Croft v. Williams*, supra; *Adair v. Brimmer*, supra.

<sup>46</sup> *Croft v. Williams*, 88 N. Y. 390.

to making investments, he would not be justified in allowing the property to go into the hands of a co-executrix who is in feeble health, and unaccustomed to business, and involved in the care of a large family of children.<sup>47</sup> But it is not decided by that case that he would be liable for the misconduct of the latter.

It has been said that this liability of one of several co-executors or co-administrators for the acts of another is extended by giving a joint bond, by which the liability is extended so as to cover the whole administration of the estate.<sup>48</sup> There was at one time a rule that, if one executor or administrator joined in a receipt for money which was actually paid to the other, the former by so joining rendered himself liable for the money as assets received by him. This rule is not supported by the modern authorities to its full extent;<sup>49</sup> and the rule now is that it is a question of fact whether the money was ever in the possession and control of the person sought to be charged. Generally speaking, if the person paying the money intends to pay it to both, the joining in the receipt by one executor or administrator amounts to a direction to pay the money to the co-executor or co-administrator, and renders both liable for the money.<sup>50</sup> And the rule now established is that such a receipt is prima facie evidence that both received the money, and the one who wishes to escape liability therefor must show that he never had possession or control of it, but joined the receipt merely for form.<sup>51</sup> So where all executors join in a deed of the real estate, but the purchase money is paid to one only, or paid to one by check immediately indorsed to another, who gets the money on it, the last-mentioned alone is liable for the funds.<sup>52</sup>

#### *Executors in Different States.*

Administrators appointed in different states are not, in any sense, co-administrators; nor is there any joint liability or estate existing

<sup>47</sup> Earle v. Earle, 93 N. Y. 112.

<sup>48</sup> Ante, p. 177.

<sup>49</sup> Shipbrook v. Hinchinbrook, 16 Ves. 478.

<sup>50</sup> Joy v. Campbell, 1 Schoales & L. 328, 341; Hovey v. Blakeman, 4 Ves. 596, 608.

<sup>51</sup> M'Nair's Appeal, 4 Rawle (Pa.) 148, 157; Monell v. Monell, 5 Johns. Ch. (N. Y.) 283; McKim v. Aulbach, 130 Mass. 484.

<sup>52</sup> Paulding v. Sharkey, 88 N. Y. 432.

between them.<sup>53</sup> And the same is true when the testator by his will appoints one executor to take the administration of his will in one state, and another in another. Thus, where the testator appointed one executor for the state of Michigan, and another for the state of New York, it was held that there was no privity between them; that the administrations were totally distinct, and each executor was responsible only for his own assets, and not for those which were in the hands of the others.<sup>54</sup>

### SUITS BETWEEN EXECUTORS OR ADMINISTRATORS.

#### 81. One of several co-executors or co-administrators cannot sue another in regard to matters connected with the estate.

It naturally follows from the nature of the interest of co-executors or co-administrators that they cannot sue each other upon matters connected with the estate.<sup>55</sup> So, if one executor or administrator is plaintiff in a suit concerning the estate, and another is defendant, the suit will abate, although there may be other plaintiffs or defendants.<sup>56</sup> If one who is executor or administrator is a creditor of the estate, he cannot sue the estate for his debt;<sup>57</sup> but he must enter the debt as a claim against the estate, and have it allowed, as will be seen later.<sup>58</sup> And it has been held that, if the other executor wrongfully refuses to allow the claim, a bill in equity will lie to compel him so to do.<sup>59</sup> But, in states where the probate courts have full jurisdiction of the settlement of estates, it is probable that such wrongdoing on the part of the executor would prop-

<sup>53</sup> Cf. ante, p. 153, c. 10.

<sup>54</sup> *Sherman v. Page*, 85 N. Y. 126. But, see *Hill v. Tucker*, 13 How. 458; *Goodall v. Tucker*, Id. 469.

<sup>55</sup> *Went. Off. Ex'r*, 75; *Moffatt v. Van Millengen*, 2 Bos. & P. 124, note c; *Martin v. Martin*, 13 Mo. 36; *Steinman v. Saunderson*, 14 Serg. & R. (Pa.) 357; *Simon v. Albright*, 12 Serg. & R. (Pa.) 429.

<sup>56</sup> *Steinman v. Saunderson*, supra; *Simon v. Albright*, supra; *Martin v. Atkinson* (Ala.) 18 South. 888.

<sup>57</sup> *Saunders v. Saunders*, 2 Litt. (Ky.) 314; *Martin v. Martin*, 13 Mo. 36; *Cole v. Wooden*, 18 N. J. Law, 15.

<sup>58</sup> *Post*, 329, c. 17.

<sup>59</sup> *Ludlow v. Ludlow*, 4 N. J. Law, 189.



erly be examined in the probate court, rather than in a court of equity.<sup>60</sup> The mere fact that a creditor of the estate has been named in the will as one of the executors does not incapacitate him to sue the estate on his debt, if he has renounced the executorship or failed to qualify, and has not acted at all in the office.<sup>61</sup>

### SAME—REMEDY IN PROBATE COURT.

**82. Generally speaking, where one executor or administrator has cause to complain of the acts of his co-executor or co-administrator, he should proceed in the probate court.**

Thus, where one executor refused to sign a petition to the probate court for leave to sell real estate to pay debts, and announced his intention to use the funds in his hands to pay legacies, and not debts, and had appropriated rents collected by him to his own use, it was held that his co-executrix could not maintain a bill in equity to compel him to sign the petition and otherwise perform his duty, but should move for his removal in the probate court.<sup>62</sup> And this principle, that one executor or administrator may apply for the removal of another, was sustained in a case in Maryland.<sup>63</sup> On the other hand, a bill in equity has been sustained in New York by one executor or administrator to compel his companion to perform his duty.<sup>64</sup> If one of the executors or administrators is fraudulently concealing part of the estate, the other may cite him into the probate court, under the statutory provision regarding the examination of persons suspected of concealing the estate, just as he might a third person.<sup>65</sup>

<sup>60</sup> Southwick v. Morrell, 121 Mass. 520; Foster v. Foster, 134 Mass. 120. Cf. post, p. 503, c. 23.

<sup>61</sup> Marsh v. Oliver, 14 N. J. Eq. 259; Dorchester v. Webb, W. Jones, 345.

<sup>62</sup> Southwick v. Morrell, 121 Mass. 520.

<sup>63</sup> Hesson v. Hesson, 14 Md. 8.

<sup>64</sup> Elmendorf v. Lansing, 4 Johns. Ch. 562.

<sup>65</sup> Case's Appeal, 35 Conn. 115.

## CHAPTER XII.

### ADMINISTRATION BONDS.

- 83. Bond is Generally Required of Both Executors and Administrators.
- 84. Bond Sometimes Required During Administration.
- 85. Bond to Pay Debts and Legacies.
- 86. Effect of not Giving Bond on Appointment.
- 87. Penalty of the Bond.
- 88. Exemption from Giving Bond or Sureties on Bond.
- 89-90. Sureties on Bond.

### BOND IS GENERALLY REQUIRED OF BOTH EXECUTORS AND ADMINISTRATORS.

83. In the majority of the United States it is provided by statute that an executor or an administrator shall, before receiving his letters and entering upon his duties, give a bond with sufficient sureties to secure the proper performance of those duties. In several states, however, while an administrator is obliged to give such bond, an executor is not obliged to give such bond, unless the circumstances of the case seem, in the discretion of the judge of probate, to demand it, and he orders the executor to do so.

The giving of a bond by an administrator, prior to entering upon the duties of his office, was the usual practice in the English courts from early times, although the executor was not generally obliged to give such security, as he was selected by the testator, who was presumed to have adjudged him fit for the office without security.<sup>1</sup>

<sup>1</sup> When Required in England. In England it has never been the practice to take bonds as a matter of course from executors, to secure the faithful performance of their duties, since the choice of the testator is supposed to be of persons suitable to perform the duties of the office, and in whom confidence can be placed, although, if the executor is insolvent, a court of chancery looking at him as a trustee, will compel him to give security before entering

In the United States, however, the executor, as well as the administrator, is regarded as in the nature of a trustee, and it is the rule in most states that the executor must give bond as well as the administrator, although the rule is not invariable. Thus it is provided by statute in some states that, if the executor resides out of the state, he may be required to give bond.<sup>2</sup> In Pennsylvania a non-resident executor may be compelled to give bond, but a resident executor can claim appointment without giving bond, and can only be compelled to give bond after his appointment.<sup>3</sup> So, in Virginia, an executor does not, as a matter of course, have to give bond, and, if he is wrongfully required to by the probate court, he may appeal.<sup>4</sup> In New York, a peculiar feature exists under the Code. There is no section of the Code expressly requiring an executor to give bond, but it is provided that, within a limited number of days, an objection may be made to the issue of letters to an executor, if his circumstances are such that they do not afford adequate security to the creditors or persons interested in the estate, or if he is a non-resident of the state, but a citizen of the United States. If this objection is made good, the executor may still, by giving bond, obtain letters; but, if he does not, the statute is construed by the courts to mean that letters shall not be granted to him.<sup>5</sup> Under this statute, if letters are issued to a nonresident without such objection, the letters cannot be subsequently revoked, nor can he be compelled to give a bond.<sup>6</sup> The "circumstances" referred to in the above statute have been said to be all the circumstances in the case, the

upon the trust. *Duncumban v. Stint*, 1 Ch. Cas. 121; *Rous v. Noble*, 2 Vern. 249. In regard to administrators, however, the practice has always been otherwise. They have always been considered merely officers of the court, and the court therefore takes security from them for the due performance of those duties; and this has been the case at least since the time of Henry VIII. St. 21 Hen. VIII. c. 5, § 3; 20 & 21 Vict. c. 77, § 80.

<sup>2</sup> N. J. Revision, "Orphans' Court," §§ 25, 43; N. J. Supp. Revision, "Orphans' Court," § 8; Brightly, *Purd. Pa. Dig. "Decedents' Estates,"* § 21.

<sup>3</sup> *Harberger's Appeal*, 98 Pa. St. 29. The fact that a contest arises as to the testamentary capacity of the testator is not enough to oblige the executor to give security. *Smith's Estate*, 14 Pa. Co. Ct. R. 161.

<sup>4</sup> *Fairfax v. Fairfax's Ex'r*, 7 Grat. (Va.) 36.

<sup>5</sup> Code Civ. Proc. §§ 2638, 2667; *Wood v. Wood*, 4 Paige (N. Y.) 302.

<sup>6</sup> *Postley v. Cheyne*, 4 Dem. Sur. (N. Y.) 492, 494.

character and situation of the applicant, as well as his financial standing. Poverty alone may or may not amount to such circumstances,<sup>7</sup> but insolvency—that is, having more debts than property—has been held to render the applicant unsuitable without security.<sup>8</sup> The fact that the applicant's property is less in value than the estate does not of itself afford a case for security.<sup>9</sup> The bearing of poverty and insolvency upon the competency of applicants for the office of executor or administrator has been already considered.<sup>10</sup> In those states where the executor is not bound by law to give a bond, he may be required to do so by the testator in the will; and, if so, the probate court will not grant letters till he gives a bond. Such a bond cannot, unless so directed by the will, be made to the probate court, as other probate bonds are, for there is no statutory authority for taking such a bond; but it should be made to the legatees under the will.<sup>11</sup> An administrator cum testamento annexo does not have the exemption of an executor, but must give bonds as other administrators do.<sup>12</sup> If an executor is not bound to give a bond, but does so voluntarily, it will be a valid obligation,<sup>13</sup> but only for the exact terms expressed therein.<sup>14</sup>

#### BOND SOMETIMES REQUIRED DURING ADMINISTRATION.

**84.** If an executor be guilty of mismanagement of the estate or waste after his appointment, bond may be required of him, if he has not already given one, to protect those interested in the estate. So, in case of either an executor or administrator, if the circumstances of the estate require a larger

<sup>7</sup> *Sutton v. Weeks*, 5 Redf. Sur. (N. Y.) 353; *Ballard v. Charlesworth*, 1 Dem. Sur. (N. Y.) 501; *Hovey v. McLean*, Id. 396.

<sup>8</sup> *Holmes v. Cock*, 2 Barb. Ch. (N. Y.) 428; *Wood v. Wood*, 4 Paige (N. Y.) 302. Cf. ante, p. 108, c. 6.

<sup>9</sup> *Mandeville v. Mandeville*, 8 Paige (N. Y.) 478.

<sup>10</sup> Ante, p. 108, c. 6.

<sup>11</sup> *Sullivan's Will*, 1 Tuck. (N. Y.) 94.

<sup>12</sup> *Small v. Com.*, 8 Pa. St. 101; *Ex parte Brown*, 2 Bradf. Sur. (N. Y.) 22.

<sup>13</sup> *Bellinger v. Thompson*, 37 Pac. 714, 26 Or. 320.

<sup>14</sup> *Chretien v. Bienvenu*, 6 South. 553, 41 La. Ann. 728. As to his liability on the bond, see post, p. 518, c. 23.

bond, or one with better sureties, this may be required by the court at any time in the course of administration.

The solvency of the executor is no answer to an applicant on allegation of mismanagement, for the executor may be guilty of mismanagement, although solvent; and if he does not give the bond he may be removed.<sup>15</sup> So, also, circumstances may arise rendering it advisable to have a further bond taken from the executor or administrator, as when further assets accrue to the estate in excess of what were originally known.<sup>16</sup> And so, if the sureties on the original bond become less solvent, the court may order a new bond, and cancel the old one.<sup>17</sup>

#### BOND TO PAY DEBTS AND LEGACIES.

85. A peculiar species of bond is authorized by statute in several states in case of an executor or administrator who is also residuary legatee. On account of his interest in the estate, he is allowed to give a bond to pay debts and legacies and allowances to widows and minor children, and is then exempt from filing inventory or account.

When an executor has given such a bond as this, he becomes liable personally up to the penal sum to perform the conditions of the bond, whether the assets of the estate are sufficient to pay the debts and legacies or not,<sup>18</sup> and beyond the penal sum so far as there are assets, but only to pay such debts as are duly proved against the estate; so that, if the time prescribed by the statute of limitations for claims against the estate has elapsed, a creditor who has not proved his

<sup>15</sup> McKennan's Appeal, 27 Pa. St. 237.

<sup>16</sup> Hardy's Estate, 16 South. 208, 46 La. Ann. 1309. Cf. Barrett v. Superior Court (Cal.) 43 Pac. 519. See, also, post, p. 192.

<sup>17</sup> Clarke v. Rice, 23 Atl. 301, 15 K. I. 132. Cf. In re Sellars (N. C.) 24 S. E. 430.

<sup>18</sup> State v. Nicols, 10 Gill & J. (Md.) 48; Bank v. Stanton, 116 Mass. 435; Jenkins v. Wood, 2 N. E. 780, 140 Mass. 66. Although, in a case in Massachusetts, it was said that such a bond is only prima facie evidence of assets, liable to be rebutted by proof. Jones v. Richardson, 5 Metc. (Mass.) 249.

claim within the time cannot sue him personally on the bond as an original promise to pay debts and legacies.<sup>19</sup> The theory being that the estate in such case is put into the executor's hands to pay the debts and legacies, if he does not do so, but dies or resigns, or is removed, and an administrator de bonis non is appointed, and receives the residue of the estate, such residue of the estate is liable for the payment of debts in the hands of such an administrator.<sup>20</sup> If such a bond is once given, it cannot be recalled and canceled afterwards.<sup>21</sup> The effect of such a bond upon the real estate is that it vests at once in the devisees, subject to the rights of creditors to take it for their debts,<sup>22</sup> and it cannot be sold by the executor or administrator de bonis non to pay debts, unless such sale is specifically authorized by the statute; and, if not, such a sale is absolutely void as against the devisee.<sup>23</sup> If the real estate is devised subject to a specific legacy, such a bond does not relieve the real estate from that specific legacy, but it does from general legacies.<sup>24</sup> The effect of giving such a bond is primarily to relieve the executor or administrator from filing any inventory or account, but it does not relieve him from the obligation of his office to pay all just debts, and to distribute the estate according to the will of the testator; nor, on the other hand, does it impose upon him any liability to pay debts and legacies beyond the amount of the estate, and beyond the penal sum of this bond. He cannot evade paying a debt simply from the fact that he has already paid the penal sum of the bond,<sup>25</sup> and the giving of such a bond is an admission of assets which renders him *prima facie* liable.<sup>26</sup> But if he has paid the penal sum of the bond, and is sued upon a debt in excess thereof, he is liable only to the extent of the assets which come into his hands, deducting the sum paid by him.<sup>27</sup> The act of giving such a bond vests all the es-

<sup>19</sup> *Jenkins v. Wood*, 2 N. E. 780, 140 Mass. 66.

<sup>20</sup> *Collins v. Collins*, 5 N. E. 632, 140 Mass. 506.

<sup>21</sup> *Alger v. Colwell*, 2 Gray (Mass.) 404.

<sup>22</sup> *Thayer v. Winchester*, 133 Mass. 449.

<sup>23</sup> *Thayer v. Winchester*, 133 Mass. 449; *Thompson v. Brown*, 16 Mass. 172.

<sup>24</sup> *Trustees of Amherst College v. Smith*, 134 Mass. 543.

<sup>25</sup> *Jenkins v. Wood*, 10 N. E. 818, 144 Mass. 238.

<sup>26</sup> *Bank v. Stanton*, 116 Mass. 435; *Jenkins v. Wood*, 2 N. E. 780, 140 Mass. 66; *State v. Nicols*, 10 Gill & J. (Md.) 48.

<sup>27</sup> *Jenkins v. Wood*, 10 N. E. 818, 144 Mass. 238.

tate in the executor or administrator, and no inventory of it is made.<sup>28</sup> The ordinary fund for the payment of debts is thus withdrawn, but there is substituted therefor a personal liability of the executor and his sureties, as above stated; and the giving this bond is an admission of assets.<sup>29</sup> This liability, however, is barred by the special statute of limitations in the same way as all other liabilities of the executor or administrator.<sup>30</sup>

#### EFFECT OF NOT GIVING BOND ON APPOINTMENT.

**86. If a person appointed executor or administrator by the court fails, in cases where a bond is required, to give the same within the time required by law, the appointment becomes voidable, but is not void.**

In one case<sup>31</sup> the court says obiter, "Probably the administration would be void if such bond were not given," and the statute provides in that state that, if the bond is not given, letters shall be granted to the other executors or administrators with the will annexed, or otherwise, as the case requires;<sup>32</sup> but the effect generally is, as said in Maine, merely that an appointment is not complete until the bond is so given.<sup>33</sup> In Pennsylvania it is expressly provided by statute that the appointment is void if the bond is not given,<sup>34</sup> but in other states, although no bond is given, the office is filled in such a sense that no other incumbent can be appointed until the appointment is revoked, although the appointment may be revoked if the appointee persists in refusing to give the required bond.<sup>35</sup> If a bond is given, which is irregular or insufficient, the

<sup>28</sup> *Brooks v. Rice*, 131 Mass. 408.

<sup>29</sup> *Colwell v. Alger*, 5 Gray (Mass.) 67.

<sup>30</sup> *Jenkins v. Wood*, 2 N. E. 780, 140 Mass. 66; *Id.*, 134 Mass. 115.

<sup>31</sup> *Picquet's Case*, 5 Pick. (Mass.) 76.

<sup>32</sup> Mass. Pub. St. c. 129, §§ 2, 3.

<sup>33</sup> *McKeen v. Frost*, 46 Me. 248. And see *Pryor v. Downey*, 50 Cal. 388; *Cleveland v. Chandler*, 3 Stew. (Ala.) 489.

<sup>34</sup> *Brightly*, *Purd. Dig. "Decedents' Estates,"* § 23.

<sup>35</sup> *Harris v. Chipman*, 33 Pac. 242, 9 Utah, 101; *Succession of Withers*, 12 South. 875, 45 La. Ann. 556; *Ex parte Maxwell*, 37 Ala. 362; *Wingate v. Wooten*, 5 Smedes & M. (Miss.) 247; *Feltz v. Clark*, 4 Humph. (Tenn.) 79. Cf. *Ions v. Harbison* (Cal.) 44 Pac. 572.

effect on the appointment is the same. Thus it has been held that taking a bond with one surety, when two or more are required by statute, does not invalidate the appointment of the administrator so as to render void in a collateral case a sale of real estate made by him, but is an irregularity which should have been cured by appeal;<sup>36</sup> but the reverse of this is held in Pennsylvania, under the statute of that state.<sup>37</sup> It has been held that an imperfect bond is sufficient, if approved by the judge of probate, to entitle the executor who gives it to account.<sup>38</sup> So a bond, not indorsed "Approved" by the judge, as required by statute, is sufficient to entitle the administrator to account.<sup>39</sup> So a bond approved by the judge of probate, in which the sureties are each bound in one-half the sum of the penalty, is valid in a collateral action; for example, a suit in equity to enforce payment for land sold by an executor.<sup>40</sup> But a bond which omits any part of the condition prescribed by statute—for example, in Maine, to account once a year under oath—is bad, and cannot be sued upon as a probate bond.<sup>41</sup> If any bond has been given which has been approved by the judge of probate in the lawful exercise of his jurisdiction, it is sufficient to render the appointment incontestable in any action except an appeal from the judge's order approving it.<sup>42</sup> An irregular bond would not have the effect of a regular one in the settlement of the estate. Thus, where by statute a judge is empowered to take a bond without sureties after notice to creditors, and a judge took such a bond without notice to creditors, it was held that the statute of limitations against creditors' claims, which begins to run from the giving of the bond, did not begin to run from the giving of such a bond.<sup>43</sup> If there are several executors or administrators, each may give a separate bond

<sup>36</sup> *Bloom v. Burdick*, 1 Hill (N. Y.) 130. As to conclusiveness of decrees of probate court, see ante, p. 19, c. 2.

<sup>37</sup> *Bradley v. Com.*, 31 Pa. St. 522.

<sup>38</sup> *Pettingill v. Pettingill*, 60 Me. 411.

<sup>39</sup> *Cameron v. Cameron*, 15 Wis. 5.

<sup>40</sup> *Baldwin v. Standish*, 7 Cush. (Mass.) 207.

<sup>41</sup> *Frye v. Crockett*, 77 Me. 157.

<sup>42</sup> *Baldwin v. Standish*, 7 Cush. (Mass.) 207. Cf. ante, p. 19, c. 2.

<sup>43</sup> *Abercrombie v. Sheldon*, 8 Allen (Mass.) 532. Cf. post, p. 540, c. 24.



in order to protect himself from liability for the acts of his fellows.<sup>44</sup>

### PENALTY OF THE BOND.

**87.** The penal sum of the bond is generally, by statute, required to be double the estimated value of the personal estate, or else is left in the discretion of the judge of probate.

In estimating the value of the property, no account can be taken of property which the deceased has conveyed or assigned away, even though the conveyance be claimed to be fraudulent, since the probate court cannot try title to property.<sup>45</sup> If the estimated value of the property is very large, it has been held, on application for letters pendente lite, that the personal property consisting of stocks, bonds, etc., may be deposited in court, and a bond given for the balance only.<sup>46</sup> In the case of an administrator de bonis non the penalty of the bond should be only double the amount of the property not already administered.<sup>47</sup> The rule when the estate is in different states or countries has been previously discussed.<sup>48</sup> In New York, by statutory provision, it is enacted that, if part of the estate consists of a claim against a corporation for negligence causing the death of the deceased, a nominal amount may be inserted as the penalty in the bond, and special letters are granted for the purpose of prosecuting the claim, but without power to compromise it or to collect it after judgment. These latter powers are granted when they become necessary, upon further security being given in double

<sup>44</sup> *Of. ante*, p. 177, c. 11; Mass. Pub. St. c. 143, § 3; *Ames v. Armstrong*, 106 Mass. 19; *Green v. Hanberry*, Fed. Cas. No. 5,759, 2 Brock. 403; *Lidderdale v. Robinson*, Fed. Cas. No. 8,337, 2 Brock. 159; *Boyd v. Boyd*, 1 Watts (Pa.) 368; *Sparhawk v. Buell*, 9 Vt. 41; *Clarke v. State*, 6 Gill & J. (Md.) 288; *Little v. Knox*, 15 Ala. 576; Ill. Ann. St. (Starr & C.) c. 3, § 24; Mich. Ann. St. §§ 5846, 5865; Vt. R. L. § 2068. And see statutes *supra*.

<sup>45</sup> *Peck v. Peck*, 3 Dem. Sur. (N. Y.) 548. Cf. *ante*, p. 40, c. 3.

<sup>46</sup> *In re Lewis' Estate*, 28 N. J. Eq. 234.

<sup>47</sup> *Sutton v. Weeks*, 5 Redf. Sur. (N. Y.) 353; *In re Nesmith*, 6 Dem. Sur. (N. Y.) 333. See, also, *In re Prout's Estate*, 12 N. Y. Supp. 64, 58 Hun, 608.

<sup>48</sup> *Ante*, p. 161, c. 10.

the amount to be obtained by the compromise or by the judgment.<sup>49</sup>

As the administration of an estate or the execution of a will may involve selling real estate, it is always necessary that the probate court should see that sufficient security is given to cover the proceeds of such a sale, either by the original probate bond or by additional security taken at the time of the sale.<sup>50</sup> If the will includes real estate subject to a power of sale, the bond should be large enough to cover the proceeds of the real estate as well as the personal estate;<sup>51</sup> but no special bond is necessary when real estate is sold simply to pay debts, if the proceeds of such sale are already sufficiently covered by the general administration bond.<sup>52</sup> The bond must be signed by the executor or administrator, otherwise it will not hold the sureties.<sup>53</sup> It may be executed by the sureties while the penal sum is still blank; and, although the principal may have informed them that the sum is to be a certain amount, and he afterwards inserts a larger amount by direction of the judge of probate, yet the bond holds the sureties.<sup>54</sup> If two executors give joint bond without sureties, they are liable for each other's acts, in the same way as other joint executors.<sup>55</sup>

<sup>49</sup> *In re Malloy*, 1 Dem. Sur. 421. See, also, *In re Govan's Estate*, 23 N. Y. Supp. 766, 2 Misc. Rep. 291.

<sup>50</sup> See statutes of each state; Mass. Pub. St. c. 143, § 4; *Robinson v. Milard*, 133 Mass. 236.

<sup>51</sup> *Holmes v. Cock*, 2 Barb. Ch. (N. Y.) 428.

<sup>52</sup> *Tenney v. Poor*, 14 Gray (Mass.) 500. See *Fay v. Valentine*, 8 Pick. (Mass.) 526.

<sup>53</sup> *Wood v. Washburn*, 2 Pick. (Mass.) 24; *Weir v. Mead*, 35 Pac. 567, 101 Cal. 125. Cf. post, p. 525, c. 23.

<sup>54</sup> *White v. Duggan*, 2 N. E. 110, 140 Mass. 18. As to alteration of bond discharging surety, see *Howe v. Peabody*, 2 Gray (Mass.) 556. The sureties are liable, even though the bond is never filed with the register of probate, if it is duly delivered. *Haywood v. Townsend* (Sup.) 38 N. Y. Supp. 517.

<sup>55</sup> *Ames v. Armstrong*, 106 Mass. 15. Cf. ante, p. 177, c. 11.

# EXEMPTION FROM GIVING BOND OR SURETIES ON BOND.

88. It is sometimes provided by statute that if the testator, or all parties interested in the estate other than creditors, expressly so request, the executor or administrator may be exempted from giving a bond or sureties on his bond; but all creditors and guardians of minors should first be notified and given a hearing, and the court may subsequently require a bond with sureties if it thinks such security to be necessary.

Such statutes are found in several states.<sup>56</sup> The notice to creditors may be by publication, like all other probate notices;<sup>57</sup> but, if the bond is taken without notice to the creditors, it is invalid, so far, at least, that the statute of limitations against creditors' claims does not begin to run from the date when the bond is given.<sup>58</sup> The request of the testator that the executor be exempted from giving surety on his bond does not apply to any others than the persons named in the request, nor does it exempt the administrator;<sup>59</sup> and even when the testator has requested such exemption the court may, on good cause shown, require a surety, in the exercise of its general powers,<sup>60</sup> or by special statutory authorization.<sup>61</sup> And it will require such bond in cases where the executor is so mismanaging the assets that the fund for the payment of debts is diminishing.<sup>62</sup>

<sup>56</sup> Cal. Code Civ. Proc. § 1396; Ill. Ann. St. (Starr & C.) c. 3, § 8; Mass. Pub. St. c. 129, § 8; Mass. St. 1885, c. 274; R. I. Pub. St. c. 184, § 14.

<sup>57</sup> Wells v. Child, 12 Allen (Mass.) 330. Cf. ante, p. 124, c. 8.

<sup>58</sup> Abercrombie v. Sheldon, 8 Allen (Mass.) 532.

<sup>59</sup> Langley v. Harris, 23 Tex. 564; Fairfax v. Fairfax's Ex'r, 7 Grat. (Va.) 36.

<sup>60</sup> Bellinger v. Thompson, 37 Pac. 714, 26 Or. 320; Clark v. Niles, 42 Miss. 460; Atwell's Ex'r v. Helm, 7 Bush (Ky.) 504.

<sup>61</sup> Allen v. Draper, 13 South. 529, 98 Ala. 590.

<sup>62</sup> In re Holderbaum, 47 N. W. 898, 82 Iowa, 69. Cf. ante, p. 184.

## SURETIES ON BOND.

89. Sureties on an executor's or administrator's bond are generally required to be residents of the state, and of sufficient financial ability to satisfy the judge of probate.
90. Sureties may, in many states, obtain counter security or a discharge upon application to the probate court.

*Qualifications of Sureties.*

The sureties on the bond are generally required to be residents of the state in which the bond is taken;<sup>63</sup> but, if two are such residents, and are sufficient to satisfy the statute, the addition of a third, not required by statute, who is not a resident, does not vitiate the bond.<sup>64</sup> The sureties need not be residents of the county, unless required by statute,<sup>65</sup> but they must be satisfactory to the judge of probate as to their financial ability, and should be worth at least the penalty of the bond over all debts in property not exempt from execution.<sup>66</sup> In states where married women may contract as if sole, the husband of an administratrix may be surety on her official bond.<sup>67</sup> It is generally provided by statute that the probate court may, in any case where the sureties have become insufficient after the bond has been taken, or the sum of the bond is too small, require a new bond or new sureties from the executor or administrator; and, if he fails to give them, he may be removed.<sup>68</sup> In such case the

<sup>63</sup> Clarke v. Chapin, 7 Allen (Mass.) 425; Conn. Laws 1885, c. 110, § 22; Ind. Rev. St. 1881, § 2242; Me. Rev. St. c. 64, §§ 9, 19; Brightly, *Purd. Pa. Dig.* 1888, "Decedents' Estates," § 21. Contra: Jones v. Jones, 12 Rich. Law (S. C.) 623; Rutherford's Heirs v. Clark's Heirs, 4 Bush (Ky.) 27. See the statutes of each state.

<sup>64</sup> Clarke v. Chapin, 7 Allen (Mass.) 425, 426.

<sup>65</sup> Barksdale v. Cobb, 16 Ga. 13.

<sup>66</sup> Sutton v. Weeks, 5 Redf. Sur. (N. Y.) 353. Cf. *In re Thompson*, 6 Dem. Sur. (N. Y.) 56.

<sup>67</sup> *In re Grove*, 6 Dem. Sur. (N. Y.) 369. Cf. ante, p. 66, c. 5.

<sup>68</sup> Cal. Code Civ. Proc. §§ 1389, 1394, 1397; Conn. Laws 1885, c. 110, § 23; Ga. Code, § 2511; Ill. Ann. St. (Starr & C.) c. 3, § 32; Iowa Rev. Code, § 2364; Me. Rev. St. c. 72, § 2; Md. Rev. Code, art. 50, § 69; Mass. Pub. St. c. 143, § 5. Cf. ante, p. 184.

liability of the sureties on the second bond for misconduct of the executor or administrator occurring at the time the first bond was in force is secondary to that of the sureties on the first bond.<sup>69</sup>

### *Counter Security.*

In many states there is also statutory provision that, if the sureties on a probate bond apprehend that the conduct of the executor or administrator is such as will make them liable on their bond, they may apply to the court to compel him to give them counter security to hold them harmless, and the court must order such security upon such request.<sup>70</sup> Such counter security covers waste committed before the execution of the bond as well as afterwards.<sup>71</sup> If the executor or administrator does not furnish such counter security, the court may order any funds in the hands of the executor or administrator to be delivered up to the sureties as a guaranty fund to protect them in case of misconduct by the executor or administrator.<sup>72</sup> If a fidelity or other corporation is duly authorized by law to become surety on probate bonds, it may take advantage of any statutory provision as to counter security, and require such counter security from the executor or administrator.<sup>73</sup>

### *Discharge of Sureties.*

A surety may, by statutory authority, be discharged by the probate or supreme court, if the court thinks it reasonable; and the principal must then give a new bond, or be removed from his trust. The sureties on the first bond are liable till the new one is approved by the judge.<sup>74</sup> One surety may alone be discharged by decree, and the decree will be good, though the other surety had no notice of the decree; but by operation of law the other surety will also be discharged.<sup>75</sup> The procuring of sureties upon his bond is considered

<sup>69</sup> *Corrigan v. Foster*, 37 N. E. 263, 51 Ohio St. 225.

<sup>70</sup> *Sifford v. Morrison*, 63 Md. 14.

<sup>71</sup> *Brown v. Murdock*, 16 Md. 521.

<sup>72</sup> *In re McKnight's Estate*, 1 App. Cas. D. C. 28.

<sup>73</sup> *March v. Deposit Co.*, 29 Atl. 521, 79 Md. 309.

<sup>74</sup> Cal. Code Civ. Proc. §§ 1403, 1404; Conn. Laws 1885, c. 110, § 26; Ill. Ann. St. (Starr & C.) c. 3, § 35; Me. Rev. St. c. 72, § 3; Mass. Pub. St. c. 143, §§ 6-8; *McKim v. Demmon*, 130 Mass. 404; *Shook v. Goddard*, 2 Dem. Sur. (N. Y.) 201.

<sup>75</sup> *McKim v. Demmon*, 130 Mass. 404. As to liability of sureties, see post, p. 524, c. 23.

to be the personal affair of the executor or administrator, and therefore he cannot charge to the estate any sums which he may have to pay to his sureties to induce them to go on his bond.<sup>76</sup>

<sup>76</sup> In re Eby's Estate, 30 Atl. 124, 164 Pa. St. 249, and 12 Pa. Co. Ct. R. 601; In re Miller's Estate, 13 Pa. Co. Ct. R. 137; In re Pickering's Estate, 4 Pa. Dist. R. 263.

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Part III.

POWERS AND DUTIES.

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## CHAPTER XIII.

### INVENTORY—APPRAISEMENT—NOTICE OF APPOINTMENT.

- 91. Inventory—Making and Filing.
- 92. Should Include All Personal Property.
- 93. Appraisement of Property.
- 94. Notice of Appointment.

### INVENTORY—MAKING AND FILING.

91. The making and filing of an inventory of the estate is generally required by statute of the executor or administrator, but in practice it is often omitted, unless specially called for. The main features of the inventory are a list of the real and personal estate, and an appraisal or estimate of the value of the inventoried property by disinterested appraisers.

The executor or administrator, being bound by the duties of his office to administer the estate under the approval of the probate court, and according to law, is generally required by statute to make out a complete list of all the assets of the estate, valued by disinterested parties, and file it with the court, so that it may know of what the estate consists.<sup>1</sup> Any one interested in the estate may require it, even though his interest is contested. Thus, one who professes

<sup>1</sup> See the statutes of each state. The inventory was provided for in England as early as the statute of Henry VIII. St. 21 Hen. VIII. c. 5, § 4. It was then to be made by the executor or administrator in the presence and by the direction of two of the creditors of the deceased; or, in default of these, by two of the next of kin, or, in default of these, by two honest persons. This inventory was to be sworn to in duplicate by the executor or administrator, and one part deposited in the probate court, and the other kept by the executor or administrator. And the performance of this duty within a certain time was made a part of the condition of the bond (see *supra*, chapter 12, "Bonds"; 22 & 23 Car. II. c. 10, § 1), as it is in many of the United States at the present time. By modern practice in England, however, an inventory is not generally required. It is only when one is called for by some person inter-

to be a creditor, and makes prima facie proof of his debt, may require an inventory, although his debt is contested.<sup>2</sup> So the filing of an inventory may be required by one of the next of kin, although the executor alleges that the person requiring it has assigned his interest, if the next of kin replies that the assignment was obtained by fraud.<sup>3</sup>

The time within which the inventory is filed is generally of slight importance. In England, where no inventory is required unless called for, although there is no limit of time fixed, beyond which an inventory may not be called for, still the courts will take into account the lapse of time, if it has been so great as to make it a hardship upon the executor or administrator to produce an inventory, and no sufficient excuse is given for not previously calling for one. Thus, a lapse of 45 years, or even of 18 years, has been held to be too great to permit the calling for an inventory.\* And probably the same considerations would be entertained in this country in those states where the filing of an inventory is not made a statutory duty of the executor or administrator. The filing of the inventory is the duty of the executor or administrator, and not of the heirs and legatees.<sup>5</sup>

A failure to file an inventory within the time specified is a tech-

ested in the estate that the court will order one to be made and filed. 1 Phillim. Ecc. 240; Toll. Ex'rs, 250. But the inventory may be called for by one having a prima facie interest in the estate, although his interest is contested, and although it is only probable or contingent. Myddleton v. Rushout, 1 Phillim. Ecc. 244; Reeves v. Freeling, 2 Phillim. Ecc. 56. By the English practice, it is not only the executor or administrator who may be called upon for an inventory. Any one into whose hands any part of the estate of the deceased was proved presumptively to have come without due process of administration might be called upon for an inventory and account of the same. Ritchie v. Rees, 1 Addams, Ecc. 144. See Holland v. Prior, 1 Mylne & K. 245-247. In the United States, however, the statutes almost universally call for inventories only from those duly appointed as executors or administrators.

<sup>2</sup> Pendle v. Waite, 3 Dem. Sur. (N. Y.) 261; Creamer v. Waller, 2 Dem. Sur. (N. Y.) 351; Forsyth v. Burr, 37 Barb. (N. Y.) 540; Thomson v. Thomson, 1 Bradf. Sur. (N. Y.) 24. Cf. ante, p. 126, c. 8.

<sup>3</sup> Schmidt v. Heusner, 4 Dem. Sur. (N. Y.) 275. Cf. ante, p. 126, c. 8; post, p. 416, c. 20.

<sup>4</sup> Ritchie v. Rees, 1 Addams, Ecc. 144; Scurrah v. Scurrah, 2 Curt. Ecc. 919.

<sup>5</sup> Mills v. Smith, 19 N. Y. Supp. 854, 65 Hun, 619.

nical breach of the administration bond,<sup>6</sup> but may generally be cured by filing such inventory when ordered by the court.<sup>7</sup> But if, on being cited to file an inventory, any delay or backwardness occurs, the courts view such actions with suspicion, and will condemn the party in costs, or allow proceedings upon the probate bond.<sup>8</sup> If no property belonging to the estate of the deceased comes into the hands or knowledge of the executor or administrator, no inventory is required;<sup>9</sup> but, if property comes to the administrator, the fact that he has disposed of it all does not release him from the duty of filing an inventory.<sup>10</sup> Though the inventory is required to be sworn to, a trifling clerical error in the form of the affidavit will not vitiate the proceedings.<sup>11</sup>

The rule as to filing an inventory includes all kinds of executors and administrators, and the inventory must be filed by any one who takes out administration; for example, an administrator *durante minoritate*,<sup>12</sup> or *pendente lite*,<sup>13</sup> or *de bonis non*.<sup>14</sup> There is, however, an exception made by statute in certain cases, where the executor or administrator, who is also residuary legatee, gives bond to pay debts and legacies, in which case he is excused from filing an inventory.<sup>15</sup> So, in others, an executor or administrator *cum testamento annexo*, who is entitled to all the personal estate after payment of debts and specific legacies, need not file an inventory, if he files in court, in a limited time, full receipts for the specific be-

<sup>6</sup> *Ellis v. Johnson*, 53 N. W. 691, 83 Wis. 394; *Selectmen of Boston v. Boylston*, 4 Mass. 318; *McKim v. Harwood*, 129 Mass. 75; *Com. v. Bryan*, 8 Serg. & R. (Pa.) 128; *Bourne v. Stevenson*, 58 Me. 499. Cf. post, p. 518, c. 23.

<sup>7</sup> *McKim v. Harwood*, 129 Mass. 75; *Phelan v. Smith*, 34 Pac. 667, 100 Cal. 158.

<sup>8</sup> *Bourne v. Stevenson*, 58 Me. 499; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *State v. French*, 23 Atl. 153, 60 Conn. 478.

<sup>9</sup> *Walker v. Hall*, 1 Pick. (Mass.) 20; *Forbes v. McHugh*, 25 N. E. 622, 152 Mass. 412.

<sup>10</sup> *Silverbrandt v. Widmayer*, 2 Dem. Sur. (N. Y.) 263.

<sup>11</sup> *Phelan v. Smith*, 34 Pac. 667, 100 Cal. 158.

<sup>12</sup> *Taylor v. Newton*, 1 Lee, Ecc. 15. Cf. ante, p. 135, c. 9.

<sup>13</sup> *Brotherton v. Hellier*, 2 Lee, Ecc. 131.

<sup>14</sup> *Wilson v. Keeler*, 2 D. Chip. (Vt.) 16.

<sup>15</sup> Mass. Pub. St. c. 132, § 5; *Jones v. Richardson*, 5 Metc. (Mass.) 247; *Holden v. Fletcher*, 6 Cush. (Mass.) 235; *Alger v. Colwell*, 2 Gray (Mass.) 404; *Colwell v. Alger*, 5 Gray (Mass.) 67; *Stebbins v. Smith*, 4 Pick. (Mass.) 97.

quests, unless some one petitions that he be compelled to file an inventory.<sup>16</sup>

*Supplementary Inventory.*

In most states only one inventory is required, and, if property comes to the knowledge or possession of the executor afterwards, he accounts for it in his annual accounts, and not in a second inventory.<sup>17</sup> But, in several of the states, if, after filing the first inventory, other goods come to his knowledge or possession, an additional inventory may be filed by the executor or administrator, including such later property.<sup>18</sup> So it is also held that, if an incorrect inventory is rendered, it may in some states be supplanted by a second which corrects the errors of the first.<sup>19</sup>

**SAME—SHOULD INCLUDE ALL PERSONAL PROPERTY.**

**92. The inventory should contain a full, true, and perfect description and estimate of all the chattels, real and personal, in possession and action, to which the executor or administrator is entitled in that character, and which come to his possession or knowledge.**

The personal property of the deceased comprises, in most states, the fund which is to be administered, and therefore should all be included in the inventory.<sup>20</sup>

The question, what property should be included in the inventory, involves the question, what property is assets of the estate, and will

<sup>16</sup> N. J. Supp. Revision, "Orphans' Court," 9.

<sup>17</sup> Hooker v. Bancroft, 4 Pick. (Mass.) 50, 53.

<sup>18</sup> Com. v. Bryan, 8 Serg. & R. (Pa.) 128; Phelan v. Smith, 34 Pac. 667, 100 Cal. 158; Md. Rev. Code, art. 50, § 133; N. Y. 3 Rev. St. (7th Ed.) p. 2297; Moore v. Holmes, 32 Conn. 553; Iowa, Revision 1860, p. 411, § 2365; Me. Rev. St. c. 64, § 47.

<sup>19</sup> Bradford's Adm'rs, 1 Browne (Pa.) 87.

<sup>20</sup> Moore v. Holmes, 32 Conn. 553; Vanmeter v. Jones, 3 N. J. Eq. 520; Turner v. Ellis, 24 Miss. 173; Griswold v. Chandler, 5 N. H. 492; Potter v. Titcomb, 1 Fairf. (Me.) 53; Bourne v. Stevenson, 58 Me. 499; Williams v. Morehouse, 9 Conn. 470; McNeel's Estate, 68 Pa. St. 412; Speakman's Appeal, 71 Pa. St. 25; Matthews v. Turner, 21 Atl. 224, 64 Md. 121.

be more fully considered in treating of the assets. It is evident, however, that property which did not belong to the deceased at the time of his death should not be included in the inventory; but there should be a detailed and specific statement of all the estate.<sup>21</sup> Even property which the executor or administrator claims as his own must be included, if it is found with the estate and apparently belongs to it.<sup>22</sup> The inventory should contain everything that is claimed to belong to the estate, even though in the possession of third parties, but putting it in the inventory does not affect the title to the goods.<sup>23</sup>

The inventory is supposed to relate to the time of the appointment of the executor or administrator, and need not properly include anything which accrues to the estate of the deceased after that time; for instance, the subsequent profits of the business of the deceased.<sup>24</sup>

*As to Property Out of the State.*

There has been some discussion whether the inventory should include property outside of the state or country where the executor or administrator is appointed. It is held in England that the inventory need not contain effects out of the country in which the executor or administrator is appointed.<sup>25</sup> But in the United States it has been held that the inventory should properly include assets in another state, unless they are in a state where administration has already been granted, the plan being to have all the assets of the estate covered by some regular administration.<sup>26</sup>

*As to Choses in Action.*

In general, all the debts due to the deceased, choses in action, and other species of claims or demands, including notes and accounts

<sup>21</sup> Washburn v. Hale, 10 Pick. (Mass.) 429; Richardson v. Merrill, 32 Vt. 27; Vanmeter v. Jones, 3 N. J. Eq. 520; Pursel v. Pursel, 14 N. J. Eq. 514. Cf. post, p. 227, c. 14.

<sup>22</sup> Simms v. Guess, 52 Ill. App. 543.

<sup>23</sup> Succession of Saloy, 10 South. 251, 43 La. Ann. 1151.

<sup>24</sup> Pitt v. Woodham, 1 Hagg. Ecc. 250; McCall v. Peachy, 3 Munf. (Va.) 288; Snodgrass v. Andrews, 30 Miss. 472.

<sup>25</sup> Raymond v. Von Watteville, 2 Lee, Ecc. 551.

<sup>26</sup> In re Butler's Estate, 38 N. Y. 397; Sherman v. Page, 85 N. Y. 128; Brightly, Purd. Pa. Dig. "Decedents' Estates," § 53; Normand v. Grogard, 17 N. J. Eq. 425; Conn. Gen. St. § 580. Cf. ante, p. 153, c. 10.

belonging to the estate, should be inventoried and appraised.<sup>27</sup> And, even though notes should be in the possession of another, the executor or administrator must inventory them, if they have come to his knowledge.<sup>28</sup>

It is always good practice, and in some states is enacted by statute, that those debts which the appraisers consider uncollectible should be inventoried as desperate. The executor or administrator should not then be held liable for them, except upon proof that he might have collected them.<sup>29</sup> If not so returned, they will be presumed to be collected in full, unless the contrary appears, but this presumption may be rebutted by showing that they were in fact desperate.<sup>30</sup>

#### *As to Real Estate.*

In many of the United States, statutes provide that real estate must also be included in the inventory. This is because the power of sale, and other statutory powers which the executor or administrator has over such estate, render it proper that it should be included in the inventory. At common law, the inventory did not include real estate,<sup>31</sup> and the insertion of this property in the inventory is wholly a matter of statute. The inventory should also include real or personal estate which has been, to the knowledge of the executor or administrator, fraudulently conveyed by the deceased to evade his creditors; but, if the executor or administrator does not know of the fraud, he cannot be held liable for not inserting in the inventory such estate.<sup>32</sup>

The question has arisen whether an inventory may be impeached by those interested in the estate who think it does not include the whole estate. The practice of the probate court in England has

<sup>27</sup> Succession of Pool, 14 La. Ann. 677; Black v. Whitall, 9 N. J. Eq. 572; Williams v. Morehouse, 9 Conn. 470; Bourne v. Stevenson, 58 Me. 499.

<sup>28</sup> Potter v. Titcomb, 1 Fairf. (Me.) 53; Bourne v. Stevenson, 58 Me. 499.

<sup>29</sup> Finch v. Ragland, 2 Dev. Eq. (N. C.) 137; In re Millenovich's Estate, 5 Nev. 189; Reiff's Appeal, 2 Pa. St. 257.

<sup>30</sup> Graham v. Davidson, 2 Dev. & B. Eq. (N. C.) 155; Schultz v. Pulver, 11 Wend. (N. Y.) 361.

<sup>31</sup> Henshaw v. Blood, 1 Mass. 35. Cf., as to real estate not generally forming part of the assets, post, p. 208, c. 14.

<sup>32</sup> Andrews v. Tucker, 7 Pick. (Mass.) 250; Minor v. Mead, 3 Conn. 289; Booth v. Patrick, 8 Conn. 106; Andruss v. Doolittle, 11 Conn. 283.

always been to entertain objections to an inventory on the ground that it does not contain a full statement of the estate.<sup>33</sup> In New York, however, it has been held with some regularity that, if the executor or administrator denies that the goods which are claimed to be wrongfully omitted from the inventory belong to the estate, he cannot be required to inventory them, but when he comes to accounting his inventory may be surcharged or falsified.<sup>34</sup> In others of the United States the practice seems to allow an inventory to be corrected upon application.<sup>35</sup> The presumption is that the inventory is a full and true statement of the estate, and the burden of proof is upon parties seeking to surcharge it.<sup>36</sup> Any item which has been included in the inventory by mistake may be stricken out, upon proper application to the court, even after the inventory has been sworn to.<sup>37</sup>

#### APPRAISEMENT OF PROPERTY.

**93. The inventory contains, also, a valuation of the articles described in it, by disinterested persons, who act as appraisers generally by order of the court.**

This valuation is only an approximation to the real value, and does not conclude anybody,<sup>38</sup> although in the probate court it is held to be *prima facie* evidence of the value of the goods appraised.<sup>39</sup> But in one case it is said not to be evidence of assets, against the executor or administrator.<sup>40</sup>

In valuing the property, the appraisers should take the value as

<sup>33</sup> *Butler v. Butler*, 2 Phillim. Ecc. 37; *Barclay v. Marshall*, Id. 188; *Telford v. Morison*, 2 Addams, Ecc. 329.

<sup>34</sup> *Montgomery v. Dunning*, 2 Bradf. Sur. (N. Y.) 220; *Greenhough v. Greenhough*, 5 Redf. Sur. (N. Y.) 192. Cf. post, p. 404, c. 20.

<sup>35</sup> *Melizet's Appeal*, 17 Pa. St. 450.

<sup>36</sup> *In re Mullan's Estate*, 26 N. Y. Supp. 683, 74 Hun, 358.

<sup>37</sup> *In re Payne's Estate*, 28 N. Y. Supp. 911, 78 Hun, 292.

<sup>38</sup> *Willoughby v. McCluer*, 2 Wend. (N. Y.) 609; *Adams v. Adams*, 22 Vt. 50; *Ames v. Downing*, 1 Bradf. Sur. (N. Y.) 321.

<sup>39</sup> *Hasbrouck v. Hasbrouck*, 27 N. Y. 182; *In re Mullan's Estate*, 39 N. E. 821, 145 N. Y. 98; *In re Childs' Estate*, 26 N. Y. Supp. 721, 5 Misc. Rep. 560; *In re Shipman's Estate*, 31 N. Y. Supp. 571, 82 Hun, 108.

<sup>40</sup> *King v. Johnson*, 21 S. E. 895, 94 Ga. 665.

of the time of the appraisalment; for instance, bonds and negotiable securities should be appraised at their market value, not at their face or nominal value.<sup>41</sup>

The appraisers are generally entitled by statute to a fee for the performance of their duties. This fee must be in accordance with the work done by them, in fact. Thus, it has been held that when the appraisers only compared a list of household furniture made by others with the furniture, and examined 27 different kinds of securities, and attached values thereto, the valuation being easily accessible at any broker's office, a finding by the surrogate that they were employed 50 days in this would be set aside.<sup>42</sup>

If the appraisers' fee is by law made proportionate to the number of days required to appraise the estate, no allowance can be made for the size or value of the estate.<sup>43</sup>

#### NOTICE OF APPOINTMENT.

**94. In many states there exist statutes which require that an executor or administrator shall, within some short time after his appointment, cause notice thereof to be publicly posted in the city or town where the deceased last dwelt, or, by order of the court, he may be required to give notice by publication in some newspaper.**

The provisions of these statutes should be closely followed.<sup>44</sup>

The importance of this notice relates mainly to the claims of creditors against the estate. The origin of the notice was in the chancery courts of England, where it was the custom, in a suit instituted by a creditor for the settlement of an estate, to order a notice to be issued, and published in the newspapers, requiring creditors to send in their claims to the executor or administrator within a certain limited time, and after the expiration of that time the executor or administrator might distribute the estate upon the basis of such

<sup>41</sup> In re Shipman's Estate, 31 N. Y. Supp. 571, 82 Hun, 108.

<sup>42</sup> In re Harriot's Estate, 40 N. E. 246, 145 N. Y. 540.

<sup>43</sup> Id.

<sup>44</sup> See statutes of the various states passim.



claims as were presented; and this practice has been adopted in the probate courts of that country by statute, leaving, however, to any creditor who has not so presented his claim, his right to follow the assets, if he can, into the hands of those to whom they have been distributed.<sup>45</sup>

This provision for notice to the creditors has two bearings in the United States. The first is, in effect, like the English statute; and as it exists in New York, New Jersey, Maryland, and other states, it provides that an executor or administrator may, by order of court, publish in the newspapers, or otherwise, a notice to creditors, requiring them to present their claims within a certain limited time, and by this notice the executor or administrator is relieved from personal liability, if he distributes the assets among those who have duly presented their claims, although, as to undistributed assets, he may be still liable.<sup>46</sup>

The second bearing relates to insolvent estates, and is that if an executor or administrator who has given public notice of his appointment does not, within a limited time from the notice of his appointment, receive from creditors demands against the estate which authorize him to declare the estate insolvent, he may, without personal liability, pay out the estate to the creditors. After the expiration of that time, if the payment is made before he has actual notice of any other claim, and if he does not wholly pay out the estate, but has not enough left to answer such other claim, he may satisfy that so far as he can, and shall be discharged from further liability; but if two or more of such other claims come to his knowledge, and he has not enough assets to satisfy them, he must declare the estate insolvent. It is obvious that this notice is thus intended for the protection of the executor or administrator from personal liability in distributing the estate, and he need not publish it if he does not choose.<sup>47</sup>

<sup>45</sup> St. 22 & 23 Vict. c. 35, § 29. See *Clegg v. Rowland*, L. R. 3 Eq. 368. Cf. post, p. 336, c. 17; Id. p. 530, c. 24.

<sup>46</sup> N. Y. 3 Rev. St. (7th Ed.) pp. 2299, 2300; N. J. Revision, "Orphans' Court," 59-64; Md. Rev. Code, art. 50, § 118. Cf. post, p. 336, c. 17; Id. p. 364, c. 18; Id. p. 395, c. 19; Id. p. 530, c. 24.

<sup>47</sup> *Fliess v. Buckley*, 90 N. Y. 292.

*Notice as Protection to the Estate.*

There is, however, a further effect of this notice in some states, namely, that upon it depends the beginning of the time limited by the special statute of limitations in regard to claims against the estates of decedents. This special statute, and its connection with the notice of appointment given by executors or administrators, will be considered later.<sup>48</sup> It is sufficient here to say that, if the notice has been properly given within the time limited by law, the special statute of limitations begins to run from the date of giving bond, or, if no bond is given, from the appointment,<sup>49</sup> or, if the notice is given later, by permission and order of the court, the statute will begin to run from the time of the order of the court.

The notice of appointment must be published in the manner provided by the law, which is generally in some newspaper, or by posting in some public place, or both. Proof of the publication of the notice may be made by affidavit of the person giving the notice filed in the probate court, or by oral evidence; and it is not necessary that the original notification, or a copy of it, should be produced.<sup>50</sup> Such a notice is valid, though it describes the person giving it as administrator, when he is in reality executor.<sup>51</sup>

<sup>48</sup> See post, p. 336, c. 17; Id. p. 530, c. 24.

<sup>49</sup> Jones v. Jones, 41 Ohio St. 417; Delaplane v. Smith, 38 Ohio St. 413.

<sup>50</sup> Green v. Gill, 8 Mass. 111; Henry v. Estey, 13 Gray (Mass.) 336.

<sup>51</sup> Finney v. Barnes, 97 Mass. 401.

## CHAPTER XIV.

## ASSETS OF THE ESTATE.

- 95. What Property Goes to Executor or Administrator.
- 96. Chattels Real are Assets.
- 97-98. Mortgages are Assets.
- 99. Property in Animals.
- 100-101. Chattels Vegetable.
- 102. Chattels Inanimate—Fixtures.
- 102a. Ownership at Time of Death.
- 103. Property Conveyed Away before Death.
- 104. Property Fraudulently Conveyed Away.
- 105. Surviving Wife's Separate Property.
- 106. Rights of Surviving Husband.
- 107. Property Owned Jointly.
- 108. Debtor of Deceased as Executor or Administrator.

## WHAT PROPERTY GOES TO EXECUTOR OR ADMINISTRATOR.

95. Personal estate of every kind and description (including chattels real) goes to the executor or administrator. Real estate descends to the heirs or devisees directly, unless otherwise ordered by statute. In many instances, however, the executor is given interests of various kinds in the real estate by will. In many states, statutes exist giving the real estate to the executor or administrator during the settling of the estate, or longer; and, in most states, statutes give an executor or administrator power to sell the real estate to pay the debts of the deceased.

The general principle is that an executor or administrator is entitled to all the personal estate of the deceased.<sup>1</sup> In the lands and

<sup>1</sup> Com. Dig. "Biens," C; Co. Litt. 388a; *Matthews v. Turner*, 21 Atl. 224, 64 Md. 109; *Palmer v. Palmer*, 21 N. W. 352, 55 Mich. 294; *Hayes v. Hayes*, 17 Atl. 634, 45 N. J. Eq. 461. As to what constitutes property of the estate, see, also, ante, p. 39, c. 3.

other real property of the deceased he has no interest, as a general rule, except so far as it may be given to him by statute, or, in case of an executor, by the will of the deceased.<sup>2</sup> The executor or administrator may, with the consent of the heirs and devisees, occupy the land, and is then accountable to them for the rents and profits, but not as assets of the estate which creditors can reach,<sup>3</sup> unless they are especially agreed to be assets of the estate,<sup>4</sup> or the heirs and devisees, by assenting to an account where they are included as assets, have treated them as such.<sup>5</sup>

By statute, in many of the states, the real estate of the decedent is made a part of his estate, and the executor or administrator has a title either in fee or during administration, or a possessory right to occupy and take the rents and profits for the settlement of the estate.<sup>6</sup> When a power of sale of land is given by a will, unless it is coupled with some interest in the land, it does not give the executor any right to occupy the land until the sale, or to collect the rents and profits.<sup>7</sup>

Another interest in the land which an executor or administrator

<sup>2</sup> Swinb. pt. 6, § 3, pl. 5; *Phelps v. Funkhouser*, 39 Ill. 402; *Hathaway v. Valentine*, 14 Mass. 501; *Almy v. Crapo*, 100 Mass. 218, 220, 221; *Vance's Heirs v. Fisher*, 10 Humph. (Tenn.) 211; *Comparet v. Randall*, 4 Ind. 55; *Ellis v. Wren*, 1 S. W. 440, 84 Ky. 254; *Harding v. Le Moyne*, 29 N. E. 188, 114 Ill. 65; *Griffith v. Beecher*, 10 Barb. (N. Y.) 432; *Bridgewater v. Brookfield*, 3 Cow. (N. Y.) 299; *Hillman v. Stephens*, 16 N. Y. 278; *McAllister v. Godbold* (Tex. Civ. App.) 29 S. W. 417; *McManus' Estate*, 14 Pa. Co. Ct. R. 379; *Sunday's Appeal*, 18 Atl. 931, 131 Pa. St. 584; *Ticknor v. Harris*, 14 N. H. 272; *Bergin v. McFarland*, 26 N. H. 533; *McFarland v. Stone*, 17 Vt. 165; *Crocker v. Smith*, 32 Me. 244; *Gladson v. Whitney*, 9 Iowa, 267; *Mowe v. Stevens*, 61 Me. 594; *Haslage v. Krugh*, 25 Pa. St. 97. See, *Abb. Desc., Wills & Adm.* §§ 147, 148. Where the heirs gave a mortgage on the land, and the administrator erroneously included the proceeds in his account, it was held that these proceeds were not assets. *Shute v. Wilkins*, 40 N. E. 848, 163 Mass. 491.

<sup>3</sup> *Almy v. Crapo*, 100 Mass. 218.

<sup>4</sup> *Brigham v. Elwell*, 14 N. E. 780, 145 Mass. 522.

<sup>5</sup> *Brooks v. Jackson*, 125 Mass. 307.

<sup>6</sup> *Dickey v. Wilkins* (Miss.) 17 South. 374; *Autrey v. Autrey*, 20 S. E. 431, 94 Ga. 579; *Grady v. Warrell* (Mich.) 63 N. W. 204; *Higgins' Estate*, 39 Pac. 506, 15 Mont. 474; *Banks v. Speers*, 11 South. 841, 97 Ala. 560; *Calhoun v. Fletcher*, 63 Ala. 574; *Dexter v. Hayes*, 55 N. W. 491, 88 Iowa, 493.

<sup>7</sup> *Watts' Estate*, 32 Atl. 25, 168 Pa. St. 431; *Young's Estate*, 16 Pa. Co. Ct. R. 54.

has in most states, by statute, is the power to sell the real estate to pay debts. This power gives the executor or administrator no estate in the land, and is a mere power only, to be exercised by leave of the court.<sup>8</sup> Its nature and characteristics will be examined in a later chapter.<sup>9</sup>

### *Land Taken on Execution.*

An executor or administrator sometimes takes land on execution for debts due the estate. In such a case the land belongs to the personal estate, and is to be accounted for as such;<sup>10</sup> and the executor or administrator holds the legal title in trust for creditors, distributees, and legatees, and may therefore maintain actions for trespass on the land, or may recover possession of it<sup>11</sup> until distribution and partition are made.<sup>12</sup>

### *Land Bought with Partnership Funds.*

Profits realized from lands which have been bought with partnership funds, and are held for partnership purposes, are considered to be personal estate, until the dissolution of the partnership, and go as such to the executor or administrator; but the land, upon such dissolution, resumes its character of real estate, and descends to the heirs.<sup>13</sup>

### *Rents.*

Rents which accrue from an estate of freehold after the death of the lessor go to the heir,<sup>14</sup> unless by statute the executor or administrator is entitled to the occupation of the estate, in which case the

<sup>8</sup> *Harding v. Le Moyne*, 29 N. E. 188, 114 Ill. 65; *Litterall v. Jackson*, 80 Va. 611.

<sup>9</sup> See post, p. 280, c. 16. If land is sold to pay debts, and a surplus remains after the debts are paid, it represents real estate, and cannot be claimed as part of the personalty. *Denton v. Tyson* (N. C.) 24 S. E. 116.

<sup>10</sup> *Phillips v. Rogers*, 12 Metc. (Mass.) 406; *Bennett v. Kiber*, 13 S. W. 220, 76 Tex. 385.

<sup>11</sup> *Willard v. Nason*, 5 Mass. 240.

<sup>12</sup> *Boylston v. Carver*, 4 Mass. 598.

<sup>13</sup> *Leaf's Appeal*, 105 Pa. St. 513; *Shearer v. Shearer*, 98 Mass. 116; *McAvoy's Estate*, 12 Phila. 83. Cf. *Foster's Appeal*, 74 Pa. St. 395.

<sup>14</sup> *Co. Litt.* 47a; *Cother v. Merrick*, Hardr. 95; *Kohler v. Knapp*, 1 Bradf. Sur. (N. Y.) 241; *Getzandafer v. Caylor*, 38 Md. 283; *In re Strickland's Estate*, 32 N. Y. Supp. 171, 10 Misc. Rep. 486.

rents accrue to him.<sup>15</sup> But a statute which gives the growing crops to the executor has no effect on rent, even though it is payable in cotton growing on the estate.<sup>16</sup> But if the owner of a chattel real, e. g. a lessee for years, makes a sublease, the rents accruing after his death go to his executor or administrator, since they are the profits of a term which was personal property, and therefore belong to them.<sup>17</sup> Rent which accrues before the death of the owner of the fee, but not then paid, goes to the executor or administrator, as a chose in action,<sup>18</sup> and the right to sue for it is in the personal representative.<sup>19</sup> Rents payable in advance, and due before the landlord's death, are assets.<sup>20</sup> It is provided by statute in many states that, when any lease is determined by the death of the lessor before the end of the period at which rent is payable, the executor or administrator may recover rent for the part of that period which has elapsed before the death of the lessor. Damages for injury to the fee of the deceased before his death are real estate, and go to the heirs;<sup>21</sup> but damages to the rental value of the land are personal estate, and go to the personal representatives.<sup>22</sup>

#### CHATTELS REAL ARE ASSETS.

**96. Chattels real are assets of the estate, and go to the executor or administrator. Chattels real are chattel interests, which issue out of, or are annexed to, the realty, and are any interests in land which are for a definite space of time,—either years, months, or days.**

The chattels real of the deceased go to the executor or administrator. Chattels real are chattel interests which issue out of, or

<sup>15</sup> *Washington v. Block*, 23 Pac. 300, 83 Cal. 290. Cf. ante, note 6.

<sup>16</sup> *Huff v. Latimer*, 11 S. E. 758, 33 S. C. 255. Cf. post, p. 215.

<sup>17</sup> *Sacheverell v. Froggatt*, 2 Saund. 371, note 7.

<sup>18</sup> 3 Bac. Abr. 63, "Executors," H, 3; Went. Off. Ex'r, 129; *Wadsworth v. Allcott*, 6 N. Y. 64; *Miller v. Crawford* (Sup.) 14 N. Y. Supp. 358; *Getzandaffer v. Caylor*, 38 Md. 283; *Martin v. Martin*, 7 Md. 376.

<sup>19</sup> *Swart v. Reveal* (Ky.) 29 S. W. 24.

<sup>20</sup> *Miller v. Crawford* (Sup.) 14 N. Y. Supp. 358.

<sup>21</sup> *Ford v. Livingston*, 24 N. Y. Supp. 412, 70 Hun, 178.

<sup>22</sup> *Paret v. Railroad Co.* (Super. N. Y.) 18 N. Y. Supp. 580.

are annexed to, the realty.<sup>23</sup> Any estates in land which are for a definite space of time—either years, months, or days—are chattel interests in the land, and go to the executor or administrator,<sup>24</sup> while any estate in possession, remainder, or reversion, which is in fee, for life, or for some uncertain interest, and is conveyed by an instrument capable of conveying a freehold, and which may last the life of the devisee or grantee, or of some other person, is a freehold estate, and does not go to the executor or administrator, but to the heir.<sup>25</sup> Estates for years,<sup>26</sup> from year to year,<sup>27</sup> or for life *pur autre vie* by statute,<sup>28</sup> are chattels real, and go to the executor or administrator, as part of the assets of the estate.

In some states leases for a long term are by statute given the character of estates of inheritance, and therefore go to the heirs, and not to the executor or administrator. Thus, leases for more than 100 years are by statute considered estates in fee in some states, while 50 years remain unexpired, so far as inheritance is concerned.<sup>29</sup> In a few states, all leases are by statute to be considered real estate.<sup>30</sup>

A lease may, and often does, at the present time, contain an option to the lessee to purchase the estate in fee during, or at the expiration of, the lease. Such an option does not change the nature of the lease, which remains an asset of the estate until the power to buy is exercised, and the estate is bought.<sup>31</sup>

The executor or administrator may also have an interest in chattels real by way of remainder. Thus, if one bequeath a term of years to one for his life, and after his death to another, and the

<sup>23</sup> 2 Bl. Comm. 386.

<sup>24</sup> 1 Prest. Est. 203; *Thornton v. Mehring*, 25 N. E. 958, 117 Ill. 55.

<sup>25</sup> Walk. Conv. (Mosley & Coote's Ed.) 63.

<sup>26</sup> N. Y. 3 Rev. St. p. 2294; *Keating v. Condon*, 68 Pa. St. 75; *Wiley's Appeal*, 8 Watts & S. (Pa.) 244; Md. Rev. Code, art. 50, § 145. See Abb. Desc., Wills & Adm. § 134.

<sup>27</sup> *Doe v. Porter*, 3 Term R. 13; *James v. Dean*, 11 Ves. 393; N. Y. 3 Rev. St. (7th Ed.) p. 2294.

<sup>28</sup> *Reynolds v. Collin*, 3 Hill (N. Y.) 441.

<sup>29</sup> Mass. Pub. St. c. 121, § 1.

<sup>30</sup> *Ford v. Livingston*, 24 N. Y. Supp. 412, 70 Hun, 178.

<sup>31</sup> *Gustin v. School-Dist.*, 54 N. W. 156, 94 Mich. 502.

second dies before the first, his interest goes to his executor.<sup>32</sup> So he may have an interest by forfeiture of condition, for if one, owning a term of years, grants it to another on condition, and after his death the condition is broken, the term goes to the executor or administrator of the grantor.<sup>33</sup>

### MORTGAGES ARE ASSETS.

**97. A mortgage before foreclosure is an asset of the estate of the mortgagee, whether it is a deed in fee or otherwise, and is personal estate, and goes to the executor or administrator; and the debt is to be paid to the executor or administrator, and not to the heirs. After foreclosure the interest of the mortgagee is real estate, and, upon his death, goes to the heirs.**

**98. The equity of redemption of the mortgagor before foreclosure is real estate, and goes to the heirs.**

The interest of the mortgagee before foreclosure is personal property, whether the mortgage deed purports to be in fee or for years; and the money due upon the mortgage is to be repaid to the executor or administrator, and not to the heir.<sup>34</sup> If, however, the mortgage is in fee, the title to the land, at common law, in the absence of statutes giving the character of personalty to the mortgage, goes to the heir, as trustee for the executor or administrator, but a conveyance will be ordered by a court of equity.<sup>35</sup>

In order to render the character of a mortgage clearly personal, it is in some states provided by statute that, whatever the term of the conveyance may be, if the mortgagee dies before foreclosure

<sup>32</sup> Went. Off. Ex'r, 189.

<sup>33</sup> Went. Off. Ex'r, 181.

<sup>34</sup> Plummer v. Doughty, 5 Atl. 526, 78 Me. 341; Bird v. Keller, 77 Me. 270; Kinna v. Smith, 3 N. J. Eq. 14; Grant v. Chambers, 7 N. J. Eq. 223; Miller v. Henderson, 10 N. J. Eq. 320; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129.

<sup>35</sup> Ellis v. Gnavas, 2 Ch. Cas. 50; Kinna v. Smith, 3 N. J. Eq. 16; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129.



the mortgaged premises, and the debt secured thereby, are to be considered personal estate in the hands of the executor or administrator, and shall be accounted for as such, and he may take possession. The debt, also, must be paid to him, and if he takes possession of the premises he is seised in trust for the persons entitled to the money.<sup>36</sup> Any deed, therefore, by the heirs of the mortgagee, made before foreclosure of the mortgage, or before a decree of the probate court directing distribution, is of no effect as passing any legal title;<sup>37</sup> and a gift of a mortgagee's interest by a will is a bequest of personal property, and passes no interest in the land.<sup>38</sup> So, if a mortgagee enters for breach of condition, but dies before foreclosure is completed, the debt and mortgage go to his executor or administrator, and not to the heirs.<sup>39</sup>

It follows, from the personal character of the mortgagee's interest in the land, that if the executor or administrator buys in the mortgaged premises, in foreclosing the mortgage, the land is personal property, and may be sold by him as such.<sup>40</sup> A mortgage interest is generally merged when the mortgagee acquires the fee, but this is not always true, and if there is evidence that the mortgagee had a contrary intention, or if there is any benefit arising to the mortgagee from keeping the mortgage alive, it will be so treated in equity, and therefore it will be assets for the executor or administrator, while the equity of redemption goes to the heir.<sup>41</sup>

The mortgagor's equity of redemption in the land is real estate, but if the mortgage is foreclosed, and surplus moneys arising from the sale are paid to the mortgagor during his life, they are assets of the estate, and go to the executor or administrator.<sup>42</sup> Whereas, if the sale is after his death, they are real estate,<sup>43</sup> and go to his heirs, as representing the equity of redemption.

<sup>36</sup> *Brooks v. Goss*, 61 Me. 315.

<sup>37</sup> *Taft v. Stevens*, 3 Gray (Mass.) 504.

<sup>38</sup> *Martin v. Smith*, 124 Mass. 111.

<sup>39</sup> *Fay v. Cheney*, 14 Pick. (Mass.) 399.

<sup>40</sup> *Lockman v. Reilly*, 95 N. Y. 64.

<sup>41</sup> *Williams, Ex'rs*, 689.

<sup>42</sup> *Bogert v. Furman*, 10 Paige (N. Y.) 496.

<sup>43</sup> *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 119.

## PROPERTY IN ANIMALS.

99. Chattels animate comprise two classes,—domestic and wild animals. Domestic animals which are the property of the deceased go to his executor or administrator, as personal property. Wild animals, so long as they are unreclaimed, are not subjects of property, but if they are tamed, or confined in one place, go to the executor or administrator.

Personal property may consist of chattels animate, such as cattle, etc.; chattels vegetable, such as crops, etc.; and chattels inanimate, such as furniture, etc.<sup>44</sup> Chattels animate may be divided into domestic animals and wild animals, or those *feræ naturæ*. In the ordinary domestic animals, such as horses, farm cattle, etc., a man may have an absolute right of property, which upon his death vests in the executor or administrator.<sup>45</sup> Dogs, being domestic animals, and also of value, go to the executor or administrator, as personal property.<sup>46</sup>

In animals *feræ naturæ*, such as wolves, foxes, etc., there is no right of property, so long as they continue in their wild and undomesticated state.<sup>47</sup> But if such animals have been reclaimed by man's industry, and either tamed, or confined so that they cannot escape, there is a qualified right of property in them, so long as they remain in his custody or possession.<sup>48</sup> And, if he dies while they are so reclaimed, they belong to the executor or administrator. Thus, pigeons, deer, rabbits, or partridges, or other animals, if they are tame, or confined in one place, go to the executors or admin-

<sup>44</sup> See Abb. Desc., Wills & Adm. § 134.

<sup>45</sup> Williams, Ex'rs, 763. Cf. Clarendon Land Investment & Agency Co. v. McClelland (Tex. Sup.) 34 S. W. 98; Goree v. State (Tex. Cr. App.) 34 S. W. 119; Wyman v. Turner (Ind. App.) 42 N. E. 652; Chesnut v. People (Colo. Sup.) 42 Pac. 656; Morse v. Patterson (Kan. App.) 42 Pac. 255.

<sup>46</sup> 4 Burn, Ecc. Law, 497; Went. Off. Ex'r, 143. Cf. Meisch v. Railway Co., 25 N. Y. Supp. 244, 72 Hun, 604; Woolsey v. Haas, 2 Mo. App. Rep'r, 1181; Furness v. Railway Co., 8 Kulp (Pa.) 103; Com. v. Gabby, 5 Pa. Dist. R. 159.

<sup>47</sup> 2 Bl. Comm. 390, 391.

<sup>48</sup> 2 Bl. Comm. 390.

istrators.<sup>49</sup> But if they fully regain their liberty the property in them ceases, unless they are so trained as to return home after escape.<sup>50</sup> But if animals *feræ naturæ* are confined in a large tract of land, as, for instance, deer in a park, or doves in a dove house, they will not go to the executor or administrator; for they are not so reclaimed as to be the subject of property, but form part of the real estate.<sup>51</sup> So fish in a pond do not belong to the executor or administrator.<sup>52</sup> But if they are in a tank or net they belong to the executor or administrator.<sup>53</sup> So oysters may be the subject of a qualified property.<sup>54</sup> But if deer are in a park, or doves in a dove house, or fish in a pond, and the deceased had the park or dove house or pond for a term of years, the deer, doves, or fish go to the executor or administrator, as accessory to the term of years in the park or dove house or pond; but the executor or administrator cannot waste them, or use them otherwise than the deceased might have done.<sup>55</sup>

#### CHATTELS VEGETABLE.

100. The natural products of land (*fructus naturales*), such as trees, grass, fruit, etc., while they are annexed to the realty, form part of the real estate, except in certain instances which will be noted, and go to the heir. But, if they have been severed from the realty in the life of the owner, they are personal estate, and go to the executor or administrator.

101. Crops which are planted and reaped annually (*fructus industriales*) are considered the personal estate of any deceased owner of an uncertain interest in land, as fee, life interest, or tenancy at will, terminated

<sup>49</sup> Went. Off. Ex'r, 143.

<sup>50</sup> 2 Bl. Comm. 392.

<sup>51</sup> Went. Off. Ex'r, 127; Case of Swans, 7 Coke. 17b.

<sup>52</sup> Co. Litt. 8a.

<sup>53</sup> Bac. Abr. tit. "Executors," H, 3.

<sup>54</sup> Fleet v. Hegeman, 14 Wend. (N. Y.) 42; Decker v. Fisher, 4 Barb. (N. Y.) 392; Lowndes v. Dickerson, 34 Barb. (N. Y.) 586; Brinkerhoff v. Starkins, 11 Barb. (N. Y.) 248.

<sup>55</sup> Went. Off. Ex'r, 127; Godol. pt. 2, c. 13, § 4; Co. Litt. 53a.

by death while the crops are in the ground, and go to the executor or administrator, as against the heir, but not as against the dowress or devisee, unless by statutory authority. Such crops are called "emblemments."

Trees, grass, fruit, etc., while they are annexed to the realty, form a part of it, and pass with the realty to the heir.<sup>56</sup> But if trees, grass, or fruit, or the produce of the soil, are severed from it during the life of the owner, they are, upon his decease, personal property, and go to the executor or administrator.<sup>57</sup> Yet, under certain circumstances, even trees annexed to the soil may be impressed with the character of personal property.<sup>58</sup> Thus, if one owning land in fee grant the trees on it to another, to be severed and removed in a short time, the property in them passes to the grantee, and if he dies they go to his executor or administrator, because they are considered as having been in law severed from the freehold;<sup>59</sup> and so if the owner sells the land, reserving the trees, they go to his executor or administrator, and not to his heir.<sup>60</sup> But the sale or reservation must be with a view to separating the trees from the land within a short time, so that it appears that the contracting parties meant to impress the character of personalty upon the trees; for if it is simply a sale or reservation of those trees, as trees growing on the land, they remain part of the real estate.<sup>61</sup>

Under the English common law, trees, although severed from the land, might go to the heir, where a tenant for life cut down timber; for he was considered to have committed waste, and the timber belonged to the inheritance, and, on the death of the tenant for life, would go to the heir or remainder-man.<sup>62</sup>

<sup>56</sup> *Liford's Case*, 11 Coke, 48a; *Swinb.* pt. 8, § 10, pl. 8. For a discussion of what constitutes real property, and what personal, see 1 *Washb. Real Prop.* pp. 8-15.

<sup>57</sup> 2 Bl. Comm. 389.

<sup>58</sup> *Went. Off. Ex'r*, 148.

<sup>59</sup> *Stukeley v. Butler*, Hob. 173; *Went. Off. Ex'r*, 148.

<sup>60</sup> *Herlakenden's Case*, 4 Coke, 63b.

<sup>61</sup> *McClintock's Appeal*, 71 Pa. St. 365.

<sup>62</sup> *Herlakenden's Case*, 4 Coke, 63a.

*Emblements.*

Under this head are included all crops which are produced annually by the labor of man, and which are therefore called "fructus industriales." Thus, if one plants land with corn, and dies, his executor or administrator is entitled to the crop, as a compensation for the labor and expense of producing the crop.<sup>63</sup> Emblements include, besides the ordinary grain crops, every crop produced annually by labor and sowing, and thus are personal property,<sup>64</sup> such as hemp, flax, saffron, and the like;<sup>65</sup> melons of all kinds;<sup>66</sup> hops also, though growing from an old root, because each annual crop requires manure and cultivation.<sup>67</sup> Potatoes also belong to the executor or administrator.<sup>68</sup> And so of carrots, parsnips, turnips, etc., though it was at one time thought otherwise.<sup>69</sup>

Trees, shrubs, and other plants planted by nurserymen in a garden as a temporary place of growth, with a view of sale, are considered as emblements, and belong to the executor or administrator, though perhaps they should be more strictly considered trade or removable fixtures.<sup>70</sup> Grass does not ordinarily come under the rule of emblements, because it is said to be the natural product of the soil.<sup>71</sup> But it seems that artificial grasses which are sown for crops might be considered emblements.<sup>72</sup>

In all cases of emblements, on the death of the owner in fee the emblements go to the executor or administrator, as against the heir,<sup>73</sup>

<sup>63</sup> Swinb. pt. 7, § 10, pl. 8; 2 Bl. Comm. 122; Co. Litt. 55b; Md. Rev. Code, art. 50, § 145. As to growing crops, see, also, *Monday v. O'Neil*, 63 N. W. 32, 44 Neb. 724; *Gray v. Worst*, 31 S. W. 585, 129 Mo. 122.

<sup>64</sup> Co. Litt. 55b. Cf. *Simpson v. Ferguson* (Cal.) 44 Pac. 484.

<sup>65</sup> Co. Litt. 55b.

<sup>66</sup> Went. Off. Ex'r, 153.

<sup>67</sup> Co. Litt. 55b.

<sup>68</sup> *Evans v. Roberts*, 5 Barn. & C. 832.

<sup>69</sup> Co. Litt. 55b; Went. Off. Ex'r, 152.

<sup>70</sup> *Penton v. Robart*, 2 East, 90; *Lee v. Risdon*, 7 Taunt. 191. See post, p. 219.

<sup>71</sup> Gilb. Ev. 215, 216.

<sup>72</sup> 4 Burn, Ecc. Law, 299; *Hosli v. Yokel*, 57 Mo. App. 622. Contra, *Evans v. Iglehart*, 6 Gill & J. (Md.) 188.

<sup>73</sup> Co. Litt. 55b; *Lawton v. Lawton*, 3 Atk. 16; *Dennett v. Hopkinson*, 63 Me. 350; *Marx v. Nelms*, 10 South. 551, 95 Ala. 304; *Cheney v. Roodhouse*, 32 Ill. App. 49; *Pattison's Appeal*, 61 Pa. St. 294; *Howe v. Batchelder*, 49 N. H. 204; *Penhallow v. Dwight*, 7 Mass. 34; *McGee v. Walker* (Mich.) 64 N. W. 482.

but not as against a dowress,<sup>74</sup> nor as against a devisee of the land,<sup>75</sup> for the owner is supposed to have meant the crops to go as part of the devise;<sup>76</sup> but this supposition may be rebutted by evidence showing that it was the testator's intention that the devisee should not have his crops, as where one devised estates to A. in fee, and to his executors, inter alia, the stock upon the farm, it was held that the devise of stock upon the farm carried the crops growing to the executor.<sup>77</sup> If there is a specific legacy of the growing crops to any one, by English law the crops vest in the executor until his assent to the legacy, and after that in the legatee.<sup>78</sup> But if a statutory authority is given to the executor or administrator to gather the crops as assets of the estate, this statutory authority annuls the common-law rule, and the crops go to the heir, unless, under the statute, the executor or administrator gathers them.<sup>79</sup>

The privilege of emblements belongs to the executor or administrator, not only of the owner of the fee, but of tenant for life, or any uncertain interest which is terminated by death while the crops are growing which he planted;<sup>80</sup> and a dowress is entitled to emblements on the land assigned to her in dower, although by the early common law it was otherwise.<sup>81</sup> If the dowress married, and her husband died before the severance of a crop planted when she became dowress, or by her, at common law her executor or administrator took the crop, because the husband had no interest in it; but if the husband sowed a crop, and then died, his executor or administrator had it, as against the dowress, because he sowed it.<sup>82</sup> Upon the death of a tenant by curtesy, the emblements, if any, belong to his executor;<sup>83</sup> and so upon death of lessee at will.<sup>84</sup>

<sup>74</sup> 2 Inst. 81, Anon., Dyer, 316a.

<sup>75</sup> Spencer's Case, Winch. 51; Cooper v. Woolfitt, 2 Hurl. & N. 122; Dennett v. Hopkinson, 63 Me. 350.

<sup>76</sup> Gilb. Ev. 214.

<sup>77</sup> West v. Moore, 8 East. 339.

<sup>78</sup> Swinb. pt. 7, § 10, pl. 8; Cox v. Godsalve, 6 East. 604.

<sup>79</sup> Wright v. Watson, 11 South. 634, 96 Ala. 536.

<sup>80</sup> Co. Litt. 55b; Com. Dig. "Biens," G, 2.

<sup>81</sup> Bract. lib. 2, fol. 96; St. Merton, 20 Hen. III. c. 2.

<sup>82</sup> Brooke, Abr. tit. "Emblements," pl. 26; Co. Litt. 55b; Haslett v. Glenn, 7 Har. & J. (Md.) 17; Hall v. Browder, 4 How. (Miss.) 224.

<sup>83</sup> 1 Rep. Husb. & Wife, 35.

<sup>84</sup> Co. Litt. 55b.

## CHATTELS INANIMATE—FIXTURES.

102. Inanimate chattels, which have been so affixed to the realty in the life of the owner as to become part of it, are no larger personal property, and descend to the heir, and not to the executor or administrator.

The bulk of the estate of a decedent which is to be administered generally consists of the ordinary personal property of everyday life. Household furniture, clothing, and money, and sometimes bonds, stocks, and notes, carriages, and other forms of personal property, will be found to form a large part of it.<sup>85</sup> In farming communities, the farm tools and implements, in business centers, the stock and merchandise of a store, will also enter into the estate.<sup>86</sup> Few questions arise as to the fact of these kinds of property being assets of the estate. There are, however, two points to be noted: First, that some chattels may be so affixed to realty as to become part of it, and then do not form part of the personal estate; second, that only property which was owned by the deceased at the time of his death forms his estate.

*Fixtures.*

When personal, inanimate chattels are affixed to the realty, they are usually denominated "fixtures." Technically speaking, "fixtures are those personal chattels which have been annexed to land, and which may be afterwards severed and removed, by the party who has annexed them, against the will of the owner of the land."<sup>87</sup>

<sup>85</sup> Williams, Ex'rs, 720.

<sup>86</sup> Heirlooms. Again, there are certain pieces of personal property which are recognized in England, and in some of the United States, as going with the real estate, and which are called "heirlooms." These, by special custom, go to the heir, with the land. 2 Bl. Comm. 427. But this subject is not of sufficient importance in the United States to demand a detailed examination, and the reader is referred to Mr. Williams' works on Executors for a statement of the English law in this regard. Williams, Ex'rs, 1721 et seq.

<sup>87</sup> Amos & F. Fixt. p. 2. See, also, the judgments of Parke, B., and Martin, B., in Elliott v. Bishop, 10 Exch. 507, 518, and of Coleridge, J., 11 Exch. 119; and see State v. Bonham, 18 Ind. 231; Pickerell v. Carson, 8 Iowa, 544; Prescott v. Wells, Fargo & Co., 3 Nev. 82; Teaff v. Hewitt, 1 Ohio St. 511.

But the term "fixtures" is commonly used to include those chattels which become part of the realty, and cannot be removed, as well as those which may be removed. The general rule is that whatever is affixed to the realty is thereby made parcel of it, and partakes of its incidents and properties, or, as the Latin maxim expresses it, "*Quicquid plantatur solo, solo cedit.*"<sup>88</sup> The effect of this rule on chattels affixed to the realty, as regards the right of the executor or administrator and heir or devisee, and the remainder-man or reversioner, will now be examined:

A chattel, in order to become a part of the realty, must be in some way actually affixed to the land or house, or other part of the realty. It is not sufficient that it be merely laid upon the ground, or brought into contact with it.<sup>89</sup> Thus, fence rails laid in piles upon the ground are personal property,<sup>90</sup> while a fence attached to the land, by posts, stakes, or otherwise, is part of the realty.<sup>91</sup> For the same reason, it has been held that where a tenant built a barn, and put it upon blocks of wood resting on the ground, and not inserted in the ground, or in any way fastened to it, the barn remained personal property, and the tenant might remove it.<sup>92</sup> But, even when personal property is in some way affixed to the realty, it does not necessarily become part thereof. Two factors then come into question, or rather one factor as evidence in two ways:

First. If the mode of affixing the chattel to the realty is of so close or complicated a nature that taking away the chattel would inflict substantial injury upon the realty, the person who affixes the chattel to the realty is presumed to have intended the affixing to be permanent, and the chattel becomes part of the realty. Thus, a furnace which is so built into and connected with a building that it cannot be removed without substantial injury to the building forms a part of the realty.<sup>93</sup>

<sup>88</sup> Williams, Ex'rs, p. 728.

<sup>89</sup> Amos & F. Fixt. p. 2; Wilde v. Waters, 16 C. B. 637; Bainway v. Cobb, 99 Mass. 457; N. Y. 3 Rev. St. (7th Ed.) p. 2295; Md. Rev. Code, art. 50, § 145.

<sup>90</sup> Clark v. Burnside, 15 Ill. 62.

<sup>91</sup> Smith v. Carroll, 4 G. Greene (Iowa) 146; Kimball v. Adams, 9 N. W. 170, 52 Wis. 554.

<sup>92</sup> Culling v. Tuffall, Bull. N. P. 34; Rex v. Otley, 1 Barn. & Adol. 161.

<sup>93</sup> Pratt v. Baker (Sup.) 36 N. Y. Supp. 928; Chase v. Wire Co., 57 Ill. App.



Second. The greater number of cases which arise on this point, however, are those in which the chattel in question is affixed in some manner to the realty, or to some portion thereof, but not in such a manner that great damage would be done to the realty if the chattel were removed. In such cases the intention of the party affixing it, as shown by the various circumstances of the case,—i. e. the manner of affixing, the purpose for which the chattel is to be used, the purpose for which the building is used, the interest of the person who affixes it in the realty, and the like,—governs the decision in the case.<sup>94</sup> If the chattel is affixed to the realty merely for the better use of the chattel, as, for instance, when a carpet is attached to a floor by tacks or nails, it remains personalty.<sup>95</sup> So gas fixtures and chandeliers attached to the gas pipes by screwing on are removable chattels.<sup>96</sup> So marble slabs or shelves resting on brackets fastened to the wall with screws are removable chattels.<sup>97</sup> But chattels which are affixed to the realty for the better and more convenient use of the building for the purposes to which it is specially adapted are considered part of the realty. Thus, when a building is built for, and specially adapted to use as, a mill, the water wheel, millstones, and running gear are part of the realty.<sup>98</sup> So, if a building is specially designed to be used as a manufactory operated by steam power, the steam engines and boilers, in most states, are considered part of the realty.<sup>99</sup> But machinery which has no special adaptation to the building in which it is placed, and to which it is affixed, may or may not be considered part of the realty, according

205; *Talbot v. Whipple*, 14 Allen (Mass.) 177; *Main v. Schwarzwaelder*, 4 E. D. Smith (N. Y.) 273. Cf. *Feeder v. Van Winkle*, 33 Atl. 399, 53 N. J. Eq. 370.

<sup>94</sup> *Capen v. Peckham*, 35 Conn. 94; *Bainway v. Cobb*, 99 Mass. 457; *Voorhees v. McGinnis*, 48 N. Y. 282; 1 Washb. Real Prop. c. 1, par. 18.

<sup>95</sup> *Hellawell v. Eastwood*, 6 Exch. 295; *Longbottom v. Berry*, L. R. 5 Q. B. 123.

<sup>96</sup> *Towne v. Fiske*, 127 Mass. 125.

<sup>97</sup> *Weston v. Weston*, 102 Mass. 514.

<sup>98</sup> *Cunningham v. Cureton*, 23 S. E. 420, 96 Ga. 489; *Winslow v. Insurance Co.*, 4 Metc. (Mass.) 314; *Noble v. Bosworth*, 19 Pick. (Mass.) 314; *House v. House*, 10 Paige (N. Y.) 158; *Lapham v. Norton*, 71 Me. 83. Cf. *Reyman v. Bank* (Ky.) 34 S. W. 697.

<sup>99</sup> *Richardson v. Copeland*, 6 Gray (Mass.) 536; *Harlan v. Harlan*, 15 Pa. St. 513; *Farrar v. Stackpole*, 6 Greenl. (Me.) 154.

as the intention of the person who affixes it may appear from other facts and circumstances in the case.<sup>100</sup> In considering the relation of the person affixing the chattel to the realty, it is important to notice the different rules which the courts have laid down as to the rights of the executor or administrator of the owner in fee, the owner for life, and the tenant for years. The law looks with strictness upon the right of the executor or administrator of the owner of land in fee, as against the heir of such owner; for the principle of the law is that the inheritance should be allowed to descend to the heir unimpaired, whereas, as between the executors or administrators of a tenant for years, and the owner of the land in fee, the law looks with somewhat more favor on the rights of the executors or administrators.<sup>101</sup> The reason for the difference is that the tenant for years, knowing his interest in the estate to be limited, is not presumed to have intended to enrich the estate permanently, and therefore the law would require such an intention to be shown more clearly than in case of the heir.<sup>102</sup> An exception to the strictness with which the law regards the executor or administrator, as against the heir, exists in case of fixtures put up in a dwelling house for ornament or convenience, such as pier glasses, pictures, or other articles affixed to the walls by nails or screws. These may be removed by the executor or administrator, if it can be done without substantial injury to the realty.<sup>103</sup>

As between the executor or administrator and the devisee, the rule is even more strict against the executor than as between him and the heir, since it is presumed that the testator intended to grant the full enjoyment of the land devised, and therefore, if there is any question, the presumption is in favor of the devisee.<sup>104</sup> As between the executor or administrator of the tenant for life and a remainder-man or reversioner, the rule is more relaxed in favor of the executor or administrator and particularly in regard to trade

<sup>100</sup> *Erdman v. Moore* (N. J. Supp.) 33 Atl. 958; *Washington Nat. Bank of Seattle v. Smith* (Wash.) 45 Pac. 736; *McLaughlin v. Nash*, 14 Allen (Mass.) 136. Cf. *Hewitt v. Electric Co.*, 61 Ill. App. 168.

<sup>101</sup> *Williams, Ex'rs*, 732.

<sup>102</sup> *Bainway v. Cobb*, 99 Mass. 459.

<sup>103</sup> 4 Burn, Ecc. Law, 301.

<sup>104</sup> *Wood v. Gaynon*, 1 Amb. 395.

fixtures, which probably would go to the executor or administrator unless so affixed to the freehold that substantial injury would be done by removing them.<sup>105</sup> In some states it is enacted by statute that fixtures annexed by tenant for life may be removed within a reasonable time after his death, and that the rules as between landlord and tenant for years shall apply. Buildings affixed to the realty by a mortgagor do not go to his personal representatives upon his death, but enhance the value of the security.<sup>106</sup>

*Same—Agricultural Fixtures.*

The exception in favor of trade fixtures has been held not to apply to agricultural fixtures.<sup>107</sup> Manure in a heap is said in England to be a chattel, and goes to the executor or administrator; but if it is scattered on the ground, so that it cannot well be gathered without gathering part of the soil with it, it is parcel of the freehold.<sup>108</sup> But in the United States it is held that manure, made in the ordinary course of farming upon a farm, is so attached to the realty as to go to the heir, and not the executor or administrator, although it is in a heap, and not broken up, or ready to be incorporated in the soil.<sup>109</sup>

*Same—Buildings as Personalty.*

In accordance with the principle stated above, that whatever is affixed to the realty becomes part of it, the rule is that houses or other buildings which are erected on land become part of the realty, even though they are built by one who does not own the land.<sup>110</sup> But by agreement of the parties the character of personalty may be given to a building, and it will then be part of the personal estate of the owner of the building.<sup>111</sup>

<sup>105</sup> Lord Dudley v. Lord Warde, 1 Amb. 113.

<sup>106</sup> Butler v. Page, 7 Metc. (Mass.) 42.

<sup>107</sup> Elwes v. Maw, 3 East, 38.

<sup>108</sup> Yearworth v. Pierce, Aley, 32.

<sup>109</sup> Fay v. Muzzey, 13 Gray (Mass.) 55.

<sup>110</sup> Graham v. Railroad Co., 36 Ind. 463; Inhabitants of Sudbury Parish v. Jones, 8 Cush. (Mass.) 184; Leland v. Gassett, 17 Vt. 403; Bonney v. Foss, 62 Me. 248.

<sup>111</sup> Wall v. Hinds, 4 Gray (Mass.) 273; Dame v. Dame, 38 N. H. 429. See 1 Washb. Real Prop. par. 4. Cf. Merchants' Nat. Bank of Crookston v. Stanton, 61 N. W. 680, 59 Minn. 532.

**OWNERSHIP AT TIME OF DEATH.**

**102a. Chattels are not assets of a decedent's estate unless**

- (a) **They were formerly owned by decedent and**
- (b) **Such ownership continued until decedent's death.**

It was mentioned above that the only personal property which forms the assets of the estate is property which the deceased owned at the time of his death. This limitation has two branches: First, that the property must have been owned by the deceased; and, second, that he must have owned it at the time of his decease.

The first of these limitations is applicable to several specific forms of property. The money due on an insurance policy on the life of the deceased is assets of the estate, if this policy was payable to the deceased or his representatives;<sup>112</sup> but, if payable to others, it is not.<sup>113</sup> A policy payable to the deceased, his executors, administrators, or assigns, for the benefit of others, is not strictly assets, but the executor holds in trust for the beneficiaries.<sup>114</sup> A policy on another's life is assets, if payable to the deceased.<sup>115</sup>

Under the by-laws of mutual relief associations, it is often provided that the beneficiary may designate to whom the money relief shall be paid after his death, if approved by the directors. Under such a by-law a designation by will is not good. The designation must be in the lifetime of the member.<sup>116</sup> Nor is any designation valid which provides that the money shall go outside of the bene-

<sup>112</sup> *Bailey v. Insurance Co.*, 114 Mass. 177; *Stevens v. Warren*, 101 Mass. 564; *New England Mut. Life Ins. Co. v. Woodworth*, 4 Sup. Ct. 364, 111 U. S. 138; *Sulz v. Association*, 28 N. Y. Supp. 263, 7 Misc. Rep. 593.

<sup>113</sup> *In re Wendell*, 3 How. Prac. N. S. (N. Y.) 68; *In re Palmer*, 3 Dem. Sur. (N. Y.) 129; *Bown v. Council*, 33 Hun (N. Y.) 263; *Com. v. Unity Mut. Life Assur. Co.*, 117 Mass. 337; *White v. White* (Tex. Civ. App.) 32 S. W. 48. As, for instance, to the widow. *Douglass v. Parker*, 24 Atl. 956, 84 Me. 522.

<sup>114</sup> *In re Van Dermoor's Estate*, 42 Hun (N. Y.) 326; *Stowe v. Phinney*, 3 Atl. 914, 78 Me. 250; *Bailey v. Insurance Co.*, 114 Mass. 177; *Gould v. Emerson*, 99 Mass. 156.

<sup>115</sup> *Swan v. Snow*, 11 Allen (Mass.) 224. As to what claims for the death of deceased by wrongful act of another are assets, see ante, p. 46, c. 3; *Griswold v. Griswold* (Ala.) 20 South. 437.

<sup>116</sup> *Daniels v. Pratt*, 10 N. E. 166, 143 Mass. 221.

beneficiaries limited by the statutes governing such associations, if there are any in the state. For instance, in many states charitable associations are authorized, in order to assist widows, orphans, or other persons dependent on the deceased members, to allow members to deposit with the society a fixed sum of money, to be held by the association till the death of the member, and then to be paid to the persons entitled thereto. If the by-laws of such an association allow members to designate to whom the money shall be paid, and a member designates "his estate," this is an invalid designation, since the "estate" is not among the statutory beneficiaries. And such a sum is not strictly assets of the estate. It should be distributed among those entitled by the by-laws of the company, if those by-laws are legal; if not, according to the statute of distributions. If it happens to be paid to the executor, he holds it, not as assets, but in trust for those entitled to it. The money paid over under a policy of insurance on buildings is personal property, if paid before the death of the decedent;<sup>117</sup> but, if the buildings are destroyed after the death of the decedent, the money represents real estate.<sup>118</sup>

Dividends on stock generally belong to the person who owns the stock when the dividends are declared, and not to the executor or administrator of a prior holder of the stock while the dividend was being earned;<sup>119</sup> but if one has a limited interest, as where one has a life interest in stock of a manufacturing company, a dividend wholly earned before his death, but not declared till after his death, will go to his executor or administrator, as being part of his life interest, and not to the subsequent owner of the stock.<sup>120</sup>

Interest on money is regarded as being due *de die in diem*, and therefore goes to the executor or administrator up to the time when the decedent died, even though it is payable half-yearly, or at other definite times.<sup>121</sup> Since an assignment in bankruptcy or insolvency vests the choses in action of the bankrupt in the assignee, of course

<sup>117</sup> *Jagger v. Bird*, 42 Hun (N. Y.) 423.

<sup>118</sup> *Wyman v. Wyman*, 26 N. Y. 253.

<sup>119</sup> *Pearly v. Smith*, 3 Atk. 260; *Richardson v. Richardson*, 75 Me. 570.

<sup>120</sup> *Johnson v. Manufacturing Co.*, 14 Gray (Mass.) 274.

<sup>121</sup> *Wilson v. Harman*, 2 Ves. Sr. 673; *Banner v. Lowe*, 13 Ves. 135.

his executor or administrator gets no interest in them after such assignment.<sup>122</sup>

A deposit in a savings bank in the name of the deceased, in trust for some one else, is not assets of the decedent's estate;<sup>123</sup> nor a deposit in a national bank in trust for another.<sup>124</sup> Interests in patents and copyrights vest in the executor or administrator, under the statutes creating those rights, both in England and the United States. And the executor or administrator may make application for a patent,<sup>125</sup> or may bring a bill in equity to enforce rights under the patent.<sup>126</sup> The same principle applies to a trade secret or process which one has discovered and kept secret, whether patentable or not, if the person about to use it will by so doing violate any contract, or be guilty of a breach of good faith.<sup>127</sup> The contract right in such case survives to the executor or administrator, and he may bring a bill for an injunction.<sup>128</sup> So a pension from

<sup>122</sup> *Ex parte Goodwin*, 1 Atk. 100.

<sup>123</sup> *In re Collyer*, 4 Dem. Sur. (N. Y.) 24; *Farrelly v. Ladd*, 10 Allen (Mass.) 127.

<sup>124</sup> *Crowe v. Brady*, 5 Redf. Sur. (N. Y.) 1.

<sup>125</sup> U. S. Rev. St. § 4896.

<sup>126</sup> *Rubber Co. v. Goodyear*, 9 Wall. 788.

<sup>127</sup> *Peabody v. Norfolk*, 98 Mass. 452.

<sup>128</sup> *Peabody v. Norfolk*, 98 Mass. 452. As to the use of a partnership name after the death of a partner, the decisions are somewhat complicated and obscure. It seems, however, settled that, if the good will or name of the business is sold, the price received for it is assets of the firm, and does not belong to the survivor. *Lindl. Partn.* 443; *Wedderburn v. Wedderburn*, 22 Beav. 104; *Smith v. Everett*, 27 Beav. 446; *Holden v. McMakin*, 1 Pars. Eq. Cas. (Pa.) 270; *Musselman's Appeal*, 62 Pa. St. 82. And the same would seem true in regard to the use of the partnership name, and any trade-marks belonging to the late firm. *Lindl. Partn.* 444-447. If any of these are not sold, the question arises, what are the rights between the representatives of the deceased partner and the surviving partner? The good will of the late partnership arises largely from the use of the partnership name, or the continuance of business in the same locality. The latter of these the surviving partner may, of course, do, unless restrained by agreement. *Musselman's Appeal*, 62 Pa. St. 82. And there are English decisions to the effect that he may do the former, and restrain the executors or administrators from using the partnership name. (*Webster v. Webster*, 3 Swanst. 490; *Lewis v. Langdon*, 7 Sim. 421; *Lindl. Partn.* 445, 446), in which case he would have practically all the benefits of

the United States, payable to a widow, who dies before it is paid, should be paid to her executor or administrator, and not to the children.<sup>129</sup>

*Choses in Action—Rights of Action.*

The right of an executor or administrator in the personal property of the deceased not in possession—in other words, choses in action—will be considered in a later chapter.<sup>130</sup>

**SAME—PROPERTY CONVEYED AWAY BEFORE DEATH.**

**103. Property which has been conveyed away by the deceased before his death does not form part of the estate, unless the conveyance was such that creditors have a right to set it aside.**

The executor or administrator is appointed for the purpose of administering the estate of the deceased. His duties, therefore, extend primarily only to that property which belonged to the deceased at the time of his death,<sup>131</sup> although other property may afterwards become part of the estate by recovery by the executor or administrator on the deceased's choses in action. As to property, however, which belonged to the deceased before his death, but was conveyed away by him during his life, the executor or administrator has no duties or powers, unless this conveyance was such that the creditors of the estate may have it set aside, and the property reclaimed as part of the estate.<sup>132</sup> An instance of the former class arises when

such good will. And if the partnership name is not sold, and the surviving partner winds up the business of the firm, he is not obliged to account in any way for the value of the firm name. *Bowman v. Floyd*, 3 Allen (Mass.) 78.

<sup>129</sup> *Foot v. Knowles*, 4 Metc. (Mass.) 386.

<sup>130</sup> See chapter 22. Any sums of money which may be due to an employé, at his death, by his employer, are assets, and go to the executor or administrator. *Hawkins v. McCalla*, 22 S. E. 141, 95 Ga. 192. If decedent bought stocks under a contract, but they were not delivered at the time of his death, the contract, and not the stocks, is the assets of the estate. *Hitchcock v. Mosher*, 17 S. W. 638, 106 Mo. 578.

<sup>131</sup> Ante, p. 224.

<sup>132</sup> *Morancy v. Palms*, 15 C. C. A. 223, 68 Fed. 64; *In re Hildebrand's Estate*, 23 N. Y. Supp. 148, 1 Misc. Rep. 245; *In re Conklin's Estate* (Surr.) 20 N. Y. Supp. 59.

a man, during his life, gives money to a third person to pay a debt of the decedent, and this payment is made after the death of the giver. In such a case the payment is held to relate back to the time of his deposit, and the money does not form part of his estate.<sup>133</sup>

The cases which raise these questions are chiefly those where the deceased has made a gift either in view of his approaching death (a "donatio causa mortis," as it is termed), or a gift inter vivos, or where he has made a conveyance which is fraudulent as to creditors, being made for the purpose of preventing them from asserting their rights over the property by legal proceedings.

### *Gifts Causa Mortis.*

A gift causa mortis, even if it be valid as between donor and donee, is still subject to the right of the executor or administrator to recover the property for the payment of debts, if the other assets are not sufficient; or, as it is stated in one case, the donee takes his title to the property subject to the contingent right of the executor or administrator to reclaim it upon the death of the donor, and is bound to have it forthcoming when called for by the executor or administrator, in case it is required for the payment of debts.<sup>134</sup> If he does not do so, the executor or administrator may have a bill in equity to set aside the gift.<sup>135</sup> And such a suit is not barred because the time for creditors to bring suit against the estate has elapsed, if the claims of the creditors have been put before the executor or administrator, and allowed by him, since they are valid claims against the estate.<sup>136</sup> In all proceedings relative to the proving of claims, their validity and amount, a donee causa mortis is represented by the executor or administrator, and is bound by the judgment of the court or commissioners, just as the executor or administrator is bound, being in privity with the estate by virtue of the gift.<sup>137</sup> The donee causa mortis, however, has no standing

<sup>133</sup> Carr's Estate, 15 Pa. Co. Ct. R. 354.

<sup>134</sup> Seybold v. Bank (N. D.) 67 N. W. 682; Mitchell v. Pease, 7 Cush. (Mass.) 353; Chase v. Redding, 13 Gray (Mass.) 420; Pierce v. Bank, 129 Mass. 433; Lewis v. Bolitho, 6 Gray (Mass.) 138. See Abb. Desc., Wills & Adm. § 18 et seq.; Mechem, Cas. Succ. p. 3 et seq.

<sup>135</sup> Chase v. Redding, 13 Gray (Mass.) 420.

<sup>136</sup> Chase v. Redding, 13 Gray (Mass.) 420.

<sup>137</sup> Mitchell v. Pease, 7 Cush. (Mass.) 353.



among those interested in the estate of the deceased. This position has been expressly decided in a case<sup>138</sup> in which the donee delivered over to the administrator the property which had been the subject of the gift, with an agreement that the delivery should not impair his rights, and the property was included by the administrator in his inventory, and was finally distributed to the heir of the intestate by decree of the court. The administrator appealed from this decree, but did not prosecute his appeal, and the donee petitioned to be allowed to take up the appeal. The court considered whether the petitioner was one aggrieved by the decree, and held that he was not, saying: "The petitioner held this property, if at all, by a gift which took effect at the death of the intestate, and then vested the property in him. Of that property he could only be deprived by the judgment of a court of common law. The judgment of a court of probate was as to this petitioner *res inter alios acta*, by which he was not concluded, and by which his rights could not be impaired." The donee is not affected by any decree of the probate court, since he has no right to appear in that court.<sup>139</sup>

If the estate is solvent, and the property which is the subject of the gift is not needed to pay debts, the further question arises between the donee and the executor or administrator, representing the legatees or distributees of the estate, whether the donation is valid, so as to pass the legal and equitable title to the donee; for if it is not the property falls into the estate, and is to be administered as assets, but if the gift is valid the donee holds the property against the legatees and distributees. The general principle is that a gift, made by one in contemplation of death, of money or other property capable of passing by delivery, is valid, if there is a clear intention to give the property, and an actual delivery at the time, *in contemplation of death*. The gift is *inchoate* and revocable until the death of the donor, and is void if he recovers, but if the gift is completed by his death the title is good, as against the executor or administrator.<sup>140</sup> The principal question in regard

<sup>138</sup> *Lewis v. Bolitho*, 6 Gray (Mass.) 137.

<sup>139</sup> *Lewis v. Bolitho*, 6 Gray (Mass.) 137.

<sup>140</sup> *Parish v. Stone*, 14 Pick. (Mass.) 203, 204. Cf. *Hatcher v. Buford*, 29 S. W. 641, 60 Ark. 169.

to the validity of such gift is the question of delivery.<sup>141</sup> A delivery of a savings-bank book, either with or without an assignment of the deposit, is a good delivery, and vests a title to the fund which is good against the administrator or executor, except so far as the money is needed to pay debts.<sup>142</sup> If, however, the gift consists in part of bank books, and in part of money, and the bank books alone are delivered, the whole gift fails, since the partial nondelivery vitiates that portion of the gift, and if a part fails the whole fails.<sup>143</sup>

A gift *causa mortis* cannot be completed by any instrument of assignment or conveyance, but only by delivery, and mere symbolical delivery is not enough.<sup>144</sup> Such a gift may be made by a husband to his wife,<sup>145</sup> and may be made by a married woman in those states where she is allowed to hold separate property.<sup>146</sup>

The delivery of a promissory note of a third person, either with or without indorsement, is sufficient delivery to constitute a gift *causa mortis*;<sup>147</sup> and the donee may maintain a suit on the note, in the name of the executor or administrator, without his consent.<sup>148</sup> But a promissory note of the donor is not a valid gift, being only a

<sup>141</sup> See Abb. Desc., Wills & Adm. § 18 et seq. The apprehension of present death from an existing disease or danger is also necessary to a valid *donatio causa mortis*. *Zeller v. Jordan*, 38 Pac. 640, 105 Cal. 143; *Langworthy v. Crissey*, 31 N. Y. Supp. 85, 10 Misc. Rep. 450; *Brunson v. Henry*, 39 N. E. 256, 140 Ind. 455.

<sup>142</sup> *Pierce v. Bank*, 129 Mass. 432, 434; *Kingman v. Perkins*, 105 Mass. 111; *Foss v. Bank*, 111 Mass. 285; *Sheedy v. Roach*, 124 Mass. 472; *Davis v. Ney*, 125 Mass. 590.

<sup>143</sup> *McGrath v. Reynolds*, 116 Mass. 568.

<sup>144</sup> *Tozer v. Jackson*, 30 Atl. 400, 164 Pa. St. 373; *Zeller v. Jordan*, 38 Pac. 640, 105 Cal. 143; *McGrath v. Reynolds*, 116 Mass. 568; *Parish v. Stone*, 14 Pick. (Mass.) 198, 203; *Sessions v. Moseley*, 4 Cush. (Mass.) 87, 92; *Coleman v. Parker*, 114 Mass. 30.

<sup>145</sup> *Whitney v. Wheeler*, 116 Mass. 490.

<sup>146</sup> *Allen v. Hamilton* (Ala.) 19 South. 903; *Marshall v. Berry*, 13 Allen (Mass.) 45.

<sup>147</sup> *Meyer v. Koehring*, 31 S. W. 449, 129 Mo. 15; *Smith v. Zumbro* (W. Va.) 24 S. E. 653; *Grover v. Grover*, 24 Pick. (Mass.) 261; *Wright v. Wright*, 1 Cow. (N. Y.) 598; *Sessions v. Moseley*, 4 Cush. (Mass.) 87; *Bates v. Kempton*, 7 Gray (Mass.) 382.

<sup>148</sup> *Bates v. Kempton*, 7 Gray (Mass.) 382.

promise to pay money.<sup>149</sup> Delivery to a third person for the donee, to be given to the donee after the death of the donor, constitutes a sufficient delivery, if it is consummated by a delivery to the donee after the death of the donor, in accordance with the wishes of the donor.<sup>150</sup> In case an executor or administrator thinks a gift causa mortis is invalid, he should bring an action of trover against the donee after demand.<sup>151</sup>

### *Gifts Inter Vivos.*

The same principles apply to gifts inter vivos. The intention to give, and delivery, are necessary to perfect the gift. It is held that a delivery of a savings-bank book to the donee, with an assignment, is good delivery to complete the gift;<sup>152</sup> and so is the deposit in the name of the donee, if it is done with the intention of making a gift to him. Direct evidence that it was done with such intention is competent, as well as inferences from all the facts of the case, and the later cases leave the subject of intention and delivery largely to the jury.<sup>153</sup> In one case it was held that a deposit in the name of the donee, "subject to the order of" the donor, might be a valid gift, the jury having found that the money was deposited as a gift; and it was held that the mere fact that the deposit was subject to the order of the donor was not conclusive against a gift at some later time, there being evidence to warrant the finding of such later gift. If the phrase, "subject to the order of" the donor, was alone, it would destroy the gift,<sup>154</sup> as it would negative the inference of any intention to part with the property.

<sup>149</sup> *Zeller v. Jordan*, 38 Pac. 640, 105 Cal. 143; *Smith v. Smith's Adm'r*, 30 N. J. Eq. 564; *Voorhees v. Combs*, 33 N. J. Law, 498.

<sup>150</sup> *Hagerman v. Wigent* (Mich.) 65 N. W. 756; *Marshall v. Berry*, 13 Allen (Mass.) 45.

<sup>151</sup> *Whitney v. Wheeler*, 116 Mass. 490.

<sup>152</sup> *In re Griffiths' Estate*, 1 Lack. Leg. N. 311; *Skillman v. Wiegand* (N. J. Ch.) 33 Atl. 929; *Foss v. Bank*, 111 Mass. 287; *Davis v. Ney*, 125 Mass. 590. Cf. *Spooner's Adm'r v. Hilbish's Ex'r* (Va.) 23 S. E. 751; *In re Wachter's Estate* (Surr.) 38 N. Y. Supp. 941.

<sup>153</sup> *Ide v. Pierce*, 134 Mass. 260; *Gerrish v. Institution*, 128 Mass. 160; *Fisk v. Cushman*, 6 Cush. (Mass.) 26.

<sup>154</sup> *Eastman v. Bank*, 136 Mass. 209.

*Deposits in Trust in Savings Bank.*

A deposit in the name of the depositor as trustee for another may or may not be a valid gift of the equitable interest to the person named as beneficiary, according as the evidence shows, the question being one of fact. Notice of the deposit to the presumed donee is strong evidence of the intention to make a gift.<sup>155</sup> The lack of such notice is strong evidence against such intention.<sup>156</sup> A gift of a savings-bank deposit may be made to a stranger in trust, and if such gift is completed by assignment of the bank book to the trustee, and delivery of it to him, it vests the title in him, as against the administrator or executor.<sup>157</sup> The trust may be evidenced by a declaration in words, as well as in writing, unless the statutes require trusts of personalty to be in writing,<sup>158</sup> and may be to pay the income to the donor for life, or to pay so much as the donor wishes to draw out during life, and, after his death, the remainder to another. Such a trust gives the donor the equitable right to whatever money he wishes during his life, and if any is left it goes to the person designated.<sup>159</sup>

The donee of a savings-bank deposit has the right to use the name of the executor or administrator, without his consent, to bring suit against the bank for the deposit.<sup>160</sup> The executor or administrator is still the real plaintiff, however, and cannot be summoned in by the bank as a defendant to contest the right of the donee. If such a contest is to be made, the donee should be summoned in to contest the claim of the executor or administrator.<sup>161</sup> The bank book is very important, in such cases, being the sole primary evidence of title to the deposit; and as most savings banks by their by-laws provide that, in case the book is lost or stolen from the depositor, he shall immediately notify the bank, it is held that a

<sup>155</sup> *Gerrish v. Institution*, 128 Mass. 159; *Ray v. Simmons*, 11 R. I. 266; *Wall v. Institution*, 3 Allen (Mass.) 96. See *McCluskey v. Institution*, 103 Mass. 300.

<sup>156</sup> *Norway Sav. Bank v. Merriam*, 33 Atl. 840, 88 Me. 146; *Clark v. Clark*, 108 Mass. 522. See *Gerrish v. Institution*, 128 Mass. 159.

<sup>157</sup> *Davis v. Ney*, 125 Mass. 590.

<sup>158</sup> *Davis v. Ney*, 125 Mass. 592; *Stone v. Hackett*, 12 Gray (Mass.) 227.

<sup>159</sup> *Davis v. Ney*, 125 Mass. 592.

<sup>160</sup> *Foss v. Bank*, 111 Mass. 287; *Pierce v. Bank*, 125 Mass. 593.

<sup>161</sup> *Pierce v. Bank*, 125 Mass. 593.

payment to one who produces the bank book protects the bank from action by the depositor, in the absence of such notice, although the person by whom the book was presented stole it and forged an assignment, or fraudulently represented himself to be the depositor.<sup>162</sup> If administration is granted upon the estate of one who still is alive, a payment to such administrator, even upon his producing the bank book, is void, and the depositor can recover against the bank the amount of the deposit.<sup>163</sup> Even if the gift of the bank deposit is completed, it is liable to be defeated by the rights of creditors existing at the time of the gift. Thus, the administrator of one who deposited money in a savings bank in trust for another, in fraud of existing creditors, and to prevent attachments, was held entitled to recover the money for administration among the creditors.<sup>164</sup> In every case of a gift the right of the donee is subject, as was said above, to the rights of creditors; and as the administrator or executor represents creditors of the estate, as well as legatees or distributees, he may recover the gift from the donee when it is necessary for the payment of debts.<sup>165</sup>

### *Gifts to Wife.*

In regard to gifts by a husband to his wife, a husband may make a valid gift to his wife, of his own property, provided he perfects the gift by delivery of the property in such manner as is necessary in perfecting gifts between other persons; i. e. by manual delivery, if the property is capable of manual delivery. Thus, when a husband, being in health, and not apprehending death, delivered to his wife several United States bonds, saying: "I give them to you. Take them, and use them for your own use and support,"—and this was done in the presence of a witness (which was not necessary, but

<sup>162</sup> *Donlan v. Institution*, 127 Mass. 185.

<sup>163</sup> *Jochumsen v. Bank*, 3 Allen (Mass.) 87. Cf. ante, p. 30, c. 2.

<sup>164</sup> *Wall v. Institution*, 6 Allen (Mass.) 321, 3 Allen (Mass.) 96; *Fisk v. Cushman*, 6 Cush. (Mass.) 23. See ante, p. 232.

<sup>165</sup> *Mitchell v. Pease*, 7 Cush. (Mass.) 353; *Chase v. Redding*, 13 Gray (Mass.) 420; *Pierce v. Bank*, 129 Mass. 433; *Lewis v. Bolitho*, 6 Gray (Mass.) 138; *Wall v. Institution*, 6 Allen (Mass.) 321, 3 Allen (Mass.) 96; *Fisk v. Cushman*, 6 Cush. (Mass.) 23; *McLean v. Weeks*, 65 Me. 411. See ante, p. 231. As to proceedings by creditors, no administrators having been appointed, see *Flagler v. Blunt*, 32 N. J. Eq. 518.

gave credence to the claim of a gift), and the wife took the bonds, and kept them in a box of her own, and there were no creditors of the estate who were unpaid, and the gift was never revoked by the husband, it was held that the gift was valid against the daughter of the deceased claiming as a distributee, and that the administrator should not enter these bonds in his inventory of the estate, nor be charged with them in his account.<sup>166</sup> It is to be observed that such a gift is held to be liable to revocation by the husband, because the possession of the wife is the possession of the husband,<sup>167</sup> and the gift, which depends upon the transfer of possession from the donor to the donee, is not consummated till the death of the donor severs those possessions, and gives a legal standing to the possession of the wife. The validity of such gifts as against heirs and distributees, the invalidity of such gifts as against creditors of the husband, after his death as well as before, and the invalidity of such gifts as against the husband if he chooses to recall them, are well settled,<sup>168</sup> and probably the same principles would allow of a valid gift to the husband from the wife; or, rather, if a wife puts her husband in possession of any of her separate estate, whether as a gift or a loan, she cannot recover it, either from him, or from his executors or administrators.<sup>169</sup>

#### SAME—PROPERTY FRAUDULENTLY CONVEYED AWAY.

104. In regard to property conveyed by the deceased in fraud of his creditors, the executor or administrator represents the creditors of the deceased, as well as his heirs and legatees or distributees, and

<sup>166</sup> *Marshall v. Jaquith*, 134 Mass. 138. To the same effect, *Johnson v. Brauch* (S. D.) 68 N. W. 173; *Kimbrough v. Kimbrough* (Ga.) 25 S. E. 176; *Rafferty v. Rafferty*, 5 Pa. Dist. R. 453.

<sup>167</sup> *Marshall v. Jaquith*, *supra*.

<sup>168</sup> *Marshall v. Jaquith*, *supra*; *McCluskey v. Institution*, 103 Mass. 300; *Fisk v. Cushman*, 6 Cush. (Mass.) 20; *Adams v. Brackett*, 5 Metc. (Mass.) 280; *Whitney v. Wheeler*, 116 Mass. 490; *Spelman v. Aldrich*, 126 Mass. 113; *Hamilton v. Lane*, 135 Mass. 358.

<sup>169</sup> See *Flynn v. Jackson* (Va.) 25 S. E. 1; *Fowle v. Torrey*, 135 Mass. 87; *Marshall v. Berry*, 13 Allen (Mass.) 45; *Kneil v. Egleston*, 4 N. E. 573, 140 Mass. 202.

he is not bound by the conveyance, but stands exactly as the creditors of the deceased would, and may maintain a bill in equity, or other action, to recover the property.

Such a bill may be maintained to follow either real estate or personal property which can be traced or identified, such as notes, mortgages, etc.<sup>170</sup> If such a suit is commenced within the time limited for suits against executors or administrators, and the estate is represented insolvent, the suit is not barred by the lapse of the limited time without any creditor filing his claim, since the property recovered would be new assets, against which the creditors might proceed anew.<sup>171</sup>

In most states, any conveyance made without consideration is considered fraudulent, and voidable by creditors whose debts existed at the time of the conveyance;<sup>172</sup> and, as to subsequent creditors, it is voidable if it is fraudulent in fact.<sup>173</sup> This rule, however, is not unanimously adopted, as in some states a distinction is drawn between voluntary conveyances made when the grantor is solvent, and those made when he is insolvent. Thus, in some states it is a well-established rule that if a person conveys away his property without consideration, when he is rendered actually insolvent by the conveyance,—i. e. when his property and probable means of payment, without the portion so conveyed, are not sufficient to pay his debts,—his creditors may set aside this conveyance, and appropriate the property to their debts.<sup>174</sup> Any conveyance made with an actual intention to defraud the creditors is voidable.<sup>175</sup> If the sale was of such a character as to be absolutely void,—e. g. if the vendor was

<sup>170</sup> *Parker v. Flagg*, 127 Mass. 28; *Welsh v. Welsh*, 105 Mass. 230; *Gilson v. Hutchinson*, 120 Mass. 32; *Gibbens v. Peeler*, 8 Pick. (Mass.) 254; *Pease v. Pease*, 8 Metc. (Mass.) 395. But see *Munn v. Marsh*, 38 N. J. Eq. 410.

<sup>171</sup> *Welsh v. Welsh*, 105 Mass. 230.

<sup>172</sup> *Haston v. Castner*, 31 N. J. Eq. 702; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481.

<sup>173</sup> *Claffin v. Mess*, 30 N. J. Eq. 211; *City Nat. Bank of Providence v. Hamilton*, 34 N. J. Eq. 158.

<sup>174</sup> *Winchester v. Charter*, 12 Allen (Mass.) 606; *McLean v. Weeks*, 65 Me. 411, 61 Me. 277:

<sup>175</sup> *Winchester v. Charter*, 12 Allen (Mass.) 606.

not of sufficient capacity to make a contract of sale,—or if the sale was not completed during his life, the executor or administrator may have an action of tort for the conversion of the goods, after demand upon the vendee.<sup>176</sup>

The executor or administrator also has a similar right of recovery in case of property which the deceased has been fraudulently induced to part with. Thus, where the deceased was fraudulently induced to indorse promissory notes to a third person, it was held that the executor might pursue those notes in the hands of the third person, and that his remedy was in equity, and that he had not an adequate remedy at law; that an action of tort would not be a satisfactory remedy, because the executor was entitled to the specific securities; that an action of replevin would not lie, because the notes had been sued on and judgment obtained, and the notes, being filed in court, could not be given up to the custody of the executor; and that an action of contract would not be sufficient, because he is entitled to the notes to use as evidence in the case, and also to settle the estate.<sup>177</sup>

#### SURVIVING WIFE'S SEPARATE PROPERTY.

105. At common law, although all the personal property of the wife which the husband has reduced to his possession during his life belongs to him absolutely, the personal property of the wife which is not so reduced by the husband to possession during his lifetime becomes the wife's property again at his death, and is not part of the assets of his estate. In most of the United States at the present time, by statute, a married woman holds her property separate from her husband, and the foregoing rule applies only in states where the common law still prevails.

In considering what property belongs to the estate of the deceased, if he was a married man, at common law the question arose

<sup>176</sup> *Kimball v. Currier*, 5 Gray (Mass.) 458.

<sup>177</sup> *Sears v. Carrier*, 4 Allen (Mass.) 339.



(and would still arise in states where the status of married women has not been changed by statute) as to whether the personal property of the wife formed part of the assets of the husband's estate. By the common law, all the property of the wife which the husband had reduced to possession in his life became his own, and, as the wife's possession was the husband's possession, it followed that all her personal property in possession became his by marriage, and formed part of his assets at his death; but her choses in action, debts, demands, notes, etc., which he had not collected, would at his death become her property again.<sup>178</sup>

On the husband's death, therefore, at common law, the wife's choses in action go to her, and not to the executor or administrator of the husband, as assets of his estate.<sup>179</sup> For instance, a bill of exchange or promissory note made to a wife *dum sola*, who afterwards marries, survives to her, if her husband has not reduced it to possession.<sup>180</sup> So a bill of exchange which is indorsed or made to a woman during coverture vests in her husband, but, if he does not sue on it, it seems to be the better law that it survives to her.<sup>181</sup> So if a promissory note is made to the wife, during coverture, for money loaned by her, and paid to her after her husband's death, the money so paid is hers, as against her husband's executor.<sup>182</sup> So a purchase-money mortgage made to husband and wife for the purchase money of a deed of the wife's land belongs, after the death of the husband, to the wife, as against the husband's administrator.<sup>183</sup> Stocks, also, which belonged to the wife, have been held to survive to her, upon her death, they having been in the possession of trustees for her, and having been bought with the proceeds of real estate held in trust for her.<sup>184</sup> If the husband takes the certificates of stock purchased with her money in his name, the stock is his.<sup>185</sup> Arrears of rent due upon land owned by the wife have been

<sup>178</sup> *Cummings v. Cummings*, 9 N. E. 730, 143 Mass. 342.

<sup>179</sup> *Co. Litt.* 351a; 1 *Rop. Husb. & Wife*, 204; *Hayward v. Hayward*, 20 *Pick. (Mass.)* 517.

<sup>180</sup> *Sherrington v. Yates*, 12 *Mees. & W.* 855; *Hart v. Stephens*, 6 *Q. B.* 937.

<sup>181</sup> *Nash v. Nash*, 2 *Madd.* 133; *Gaters v. Madeley*, 6 *Mees. & W.* 423.

<sup>182</sup> *Phelps v. Phelps*, 20 *Pick. (Mass.)* 556.

<sup>183</sup> *Draper v. Jackson*, 16 *Mass.* 479.

<sup>184</sup> *Scawen v. Blunt*, 7 *Ves.* 294.

<sup>185</sup> *Cummings v. Cummings*, 9 N. E. 730, 143 *Mass.* 341.

held to survive to her, if the husband has not collected them during his life.<sup>186</sup> So of a rent service, rent charge, or rent seek, of which the husband is seised in the right of his wife. Arrears of such rent go to the wife, and not to the executors or administrators of the husband.<sup>187</sup>

An important question is, what action on part of the husband amounts to a reduction of his wife's choses in action into possession. Of course, if a debt, legacy, or other sum owing to the wife is paid to her husband, or to one appointed by him, or by him and his wife, to receive it, this is such a reduction to possession that the wife's title is divested, and the husband's executor or administrator is entitled to the money.<sup>188</sup>

An appropriation of money in a third person's hands to a payment of the debt or legacy will not do so.<sup>189</sup> Nor does a mere intention on the part of the husband to reduce the chose in action into possession act to transfer the title to him.<sup>190</sup> The receipt by the husband of the property, if it is in some representative capacity, and not as husband, does not act as a reduction into possession. Thus, where a trustee and executor married one of the residuary legatees, his possession of the personal estate of the testator was held to be as trustee and executor, and not as husband, and therefore the wife's share of the residue did not go to his executor, but survived to her.<sup>191</sup>

If the husband during his life proceeds at law to collect the debt or other thing owed, alone, and he die after judgment, the judgment goes to his executors and administrators, and does not survive to the wife.<sup>192</sup> But if he sues with her the judgment survives to her.<sup>193</sup> In equity, when both husband and wife are parties, the right to the property does not become changed until a decree is entered to that

<sup>186</sup> 1 *Rop. Husb. & Wife*, 175; 1 *Rolle, Adm'r*, 350, tit. "Baron and Feme," D, pl. 2.

<sup>187</sup> *Co. Litt.* 351b; *Temple v. Temple*, *Cro. Eliz.* 791.

<sup>188</sup> 1 *Rop. Husb. & Wife*, 220.

<sup>189</sup> *Blount v. Bestland*, 5 *Ves.* 515.

<sup>190</sup> 1 *Rop. Husb. & Wife*, 208.

<sup>191</sup> *Baker v. Hall*, 12 *Ves.* 497. See, also, *Wall v. Tomlinson*, 16 *Ves.* 413.

<sup>192</sup> *Russel's Case*, *Noy*, 70; *Oglander v. Baston*, 1 *Vern.* 396.

<sup>193</sup> *Russel's Case*, *Noy*, 70; *Oglander v. Baston*, 1 *Vern.* 396.

effect, or an order is granted directing the money to be paid to the husband.<sup>194</sup> The fact that the husband alone proves a wife's debt in a proceeding in bankruptcy does not alter the property, but if he dies the dividend is to be paid to the wife, and not to the husband's executor.<sup>195</sup> An award by arbitrators in favor of the husband will alter the property and make it his.<sup>196</sup>

The wife's choses in action may be transferred to the husband by an antenuptial settlement, if that is expressly so stipulated in the settlement, and in that case her right of survivorship is lost; but this will not carry property accruing to her after marriage, unless expressly so stipulated.<sup>197</sup> But by postnuptial settlement this could not be done at common law, because the wife is incapable of contracting with the husband after marriage.<sup>198</sup>

The foregoing discussion of the status of the wife's personal property as regards her husband's estate is based upon the rules of the common law. The questions discussed do not generally arise in the United States at the present day, as in most states the statutes allow married women to hold their property as their own, separate from that of their husbands, and in such a case no pretense could be found for including any of it in his estate.

#### RIGHTS OF SURVIVING HUSBAND.

**106.** At common law, upon the death of the wife the assets of her estate went to her husband, as her administrator. By statute in most of the United States a married woman is entitled to hold separate property, and upon her death it is administered as if she were sole.

When the husband survives, a question arises as to whether any portion of his wife's property is his by survivorship. Under the statutes of most states, allowing married women to hold property

<sup>194</sup> *Murray v. Lord Elbank*, 10 Ves. 91.

<sup>195</sup> *Anon.*, 2 Vern. 707.

<sup>196</sup> 1 *Rop. Husb. & Wife*, 219.

<sup>197</sup> 1 *Rop. Husb. & Wife*, 298.

<sup>198</sup> 1 *Rop. Husb. & Wife*, 303.

as their own, he cannot claim any of her property as his, except as distributed in due course of administration, or by her bequest. At common law, however, all her property which he reduced to possession in her life was his, and on her death, if he took out administration (as he had a right to do), he was, at common law, entitled to all,—even to her sole and separate property,—as administrator, and not as next of kin.<sup>199</sup>

If he dies before taking out administration, or before collecting the property, it goes to her next of kin, and not to his executors or administrators.<sup>200</sup> In Connecticut, by statute, the wife's personal property, on marriage, becomes the property of the husband in trust for her; and if he survives her he takes it for his life, and after his death it goes to her representatives.<sup>201</sup> In all cases where the husband has reduced his wife's choses in action into his own possession, obviously any action must be brought by him, after her death as well as before, in his individual capacity.<sup>202</sup>

There may be cases where both husband and wife perish in the same calamity. In such case, title by survivorship depends upon proof of actual survivorship, and there is no presumption one way or the other. If the proof fails, the party whose title depends upon making out the survivorship must fail.<sup>203</sup>

### PROPERTY OWNED JOINTLY.

**107. Personal property in which the deceased had an interest as joint tenant, or in some states as partner, goes to his surviving co-owner; but in other states property owned as a partner, and property owned as a tenant in common, go to the executor or administrator.**

<sup>199</sup> *Proudley v. Fielder*, 2 Mylne & K. 57; *Bartlett v. Bartlett*, 137 Mass. 158.

<sup>200</sup> *Betts v. Kimpton*, 2 Barn & Adol. 273; *Hill v. Hunt*, 9 Gray (Mass.) 66. Cf. also, ante, p. 64, c. 5.

<sup>201</sup> Conn. Gen. St. §§ 2792-2794; *Sherwood v. Sherwood*, 32 Conn. 1; *Mason v. Homer*, 105 Mass. 116.

<sup>202</sup> *Huntley v. Griffith*, Moore, 452.

<sup>203</sup> *Fuller v. Linzee*, 135 Mass. 468; *Wing v. Angrave*, 8 H. L. Cas. 183. Cf., also, ante, p. 65, c. 5; 1 Greenl. Ev. (15th Ed.) §§ 29, 30, note.

Personal property of which the deceased was joint tenant with others goes to the co-owners, by right of survivorship, for the rule as to survivorship holds in regard to personal property held by joint tenants as well as to real estate.<sup>204</sup> Partnership property, however, does not follow this rule, but the share of the deceased goes to the executors or administrators of the deceased. This exception is a branch of the mercantile law, and is considered to be for the advancement of trade.<sup>205</sup> But in some states this rule does not hold, and all partnership property goes to the surviving partner.<sup>206</sup> Yet not absolutely, but only so far as to enable him to reduce the effects to money and pay the debts. After doing this he must account to the representatives of the deceased for the money which represents the share of the deceased.<sup>207</sup> In other states the partnership affairs are settled in the probate court by the administrators or executors of the deceased partner.<sup>208</sup> The English rule as to nonsurvivorship of partnership property extends to all traders, including manufacturers,<sup>209</sup> and possibly all persons engaged in joint undertakings in the nature of trade.<sup>210</sup> Thus, if two take a lease of a farm jointly, and one dies, the lease survives to the survivor, but the stock on the farm belongs partly to the representatives of the deceased.<sup>211</sup> So where money due on a joint mortgage is paid, one of the mortgagees having died, his share must be paid to his representatives.<sup>212</sup> As to what may be done in the way of settling up the partnership estate by the representatives of the deceased, the subject will be considered later.

<sup>204</sup> Swinb. pt. 3, § 6, pl. 1; Co. Litt. 182a; Harris v. Fergusson, 16 Sim. 308.

<sup>205</sup> Swinb. pt. 3, § 6, pl. 1; Rex v. Collectors of Customs, 2 Maule & S. 225; Cook v. Lewis, 36 Me. 342; Voorhis v. Childs' Ex'r, 17 N. Y. 356; Tremper v. Conklin, 44 N. Y. 61.

<sup>206</sup> Bush v. Clark, 127 Mass. 112; Freeman v. Freeman, 136 Mass. 263; Burnside v. Merrick, 4 Metc. (Mass.) 541; Washburn v. Goodman, 17 Pick. (Mass.) 525.

<sup>207</sup> Dyer v. Clerk, 5 Metc. (Mass.) 562.

<sup>208</sup> Cook v. Lewis, 36 Me. 342.

<sup>209</sup> Buckley v. Barber, 6 Exch. 164.

<sup>210</sup> Hamond v. Jethro, 2 Brownl. & G. 99.

<sup>211</sup> Jeffereys v. Small, 1 Vern. 217.

<sup>212</sup> Petty v. Styward, 1 Ch. R. 31.

**DEBTOR OF DECEASED AS EXECUTOR OR ADMINISTRATOR.**

108. When a debtor of the deceased is appointed executor or administrator, the effect on the debt is as follows:

- (a) At common law, when a debtor is appointed executor the debt is extinguished, provided the estate was solvent.
- (b) At common law, when a debtor is appointed administrator suit on the debt is temporarily suspended.
- (c) In equity, and by statute in many states, when a debtor is appointed executor or administrator the debt is charged in his account, provided he is solvent.

The question of the effect of appointing a debtor as executor also gave rise at common law to numerous cases in which it was held that such a nomination operated as a release or extinguishment of the debt, on the ground that as the debt was merely the right to recover a sum of money by action, and as the executor could not maintain an action against himself, the appointment suspended the action; and, when a personal action was once suspended by the voluntary act of the party entitled to it, it was forever gone and discharged.<sup>213</sup> It was, however, held in equity, and is now generally established law, unless otherwise provided by statute, that the executor is supposed to have paid the debt to the estate, and therefore is charged with the amount of the debt as assets in his hands for the payment of debts and legacies, and this amount must be accounted for by him in the probate court as assets actually realized. The debt is, however, considered extinguished, as between the executor and those entitled to distribution of the estate, unless there is some provision of statute to the contrary effect.<sup>214</sup> And the executor and sureties are liable for the amount of the debt in the same manner as if he had received it from any other debtor of the

<sup>213</sup> Went. Off. Ex'r (14th Ed.) p. 73, c. 2; *Soverhill v. Suydam*, 59 N. Y. 140; *Ipswich Manuf'g Co. v. Story*, 5 Metc. (Mass.) 313; *Pusey v. Clemson*, 9 Serg. & R. (Pa.) 208.

<sup>214</sup> *Ipswich Manuf'g Co. v. Story*, 5 Metc. (Mass.) 310; *Leland v. Felton*, 1 Allen (Mass.) 531; *Hobart v. Stone*, 10 Pick. (Mass.) 215; *Soverhill v. Suy-*

deceased.<sup>215</sup> So a debt due from the firm of which the executor is a member is to be considered assets of the estate, and to be accounted for in the same way as other assets.<sup>216</sup>

Even under the rule at common law the appointment of a debtor as executor did not apply in cases where there were not enough assets to satisfy the testator's debts, for in such a case the release by the creditor from the debt would be absolutely voluntary.<sup>217</sup> When a debtor is appointed administrator by operation of law, the debt is not extinguished, since this suspension of the right to recover the debt, being involuntary, does not discharge the debt, but only causes temporary suspension of suit for the recovery of it.<sup>218</sup>

In most states, however, by statutory provision, it is enacted that the appointment of a debtor as executor or administrator does not operate as an extinguishment of the debt, but it is treated as any other debt owing to the estate, and, if it can be collected (i. e. if the executor or administrator is solvent), then he is held to account for it as part of the assets.<sup>219</sup> In other states the statutes, while not extinguishing the debt, treat it as cash in the hands of the executor or administrator, just as the equitable rule above stated does.<sup>220</sup> In such a case, if the executor or administrator is insol-

dam, 59 N. Y. 142; *Wright v. Lang*, 66 Ala. 389; *In re Consalus*, 95 N. Y. 340; *Griffin v. Bonham*, 9 Rich. Eq. (S. C.) 71, 77; *Davenport v. Richards*, 16 Conn. 310, 316.

<sup>215</sup> *Leland v. Felton*, 1 Allen (Mass.) 531; *Choate v. Arrington*, 116 Mass. 552; *Stevens v. Gaylord*, 11 Mass. 269; *Sigourney v. Wetherell*, 6 Metc. (Mass.) 553; *Com. v. Gould*, 118 Mass. 300, 307; *Winship v. Bass*, 12 Mass. 198; *Benchley v. Chapin*, 10 Cush. (Mass.) 173; *Piper's Estate*, 15 Pa. St. 533.

<sup>216</sup> *Leland v. Felton*, 1 Allen (Mass.) 531.

<sup>217</sup> *Holliday v. Boas*, 1 Rolle, Abr. 920, 921; *Woodward v. Lord Darcy*, Plowd. 186.

<sup>218</sup> *Wankford v. Wankford*, 1 Salk. 303; *Went. Off. Ex'r* (14th Ed.) p. 76, c. 2. Cf. *supra*, p. 242.

<sup>219</sup> Such is the case in Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Jersey, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Virginia, and West Virginia. See the statutes of these states.

<sup>220</sup> California, Kansas, Nevada, New York, Ohio, Oregon, and Texas. See the statutes of these states.

vent during the period of administration the debt is not charged as assets, but considered as an ordinary uncollectible debt.<sup>221</sup>

*Mortgagor Appointed Executor.*

In applying this rule to a mortgage debtor who has been appointed executor, in those states where the equitable rule is recognized the qualification exists that the debt is not discharged unless the debtor accepts the office, and charges himself in his inventory and account with the debt as assets. If he does this, the mortgage and debt are discharged,<sup>222</sup> unless equitable considerations keep them alive. If, therefore, a mortgagor becomes executor, and charges his debt in the inventory or account, the mortgage is ordinarily discharged, and any conveyance of the mortgage by assignment by such executor or administrator vests no title in the assignee.<sup>223</sup> What the effect of the executor or administrator refusing to charge himself with the debt would be, does not appear to be settled. In the case above cited <sup>224</sup> it is said that such refusal might be cause for removal, and that after such removal an administrator de bonis non might sue the former executor or administrator for the debt, in which case it seems that the mortgage also would survive.<sup>225</sup> There may, however, be equities which will keep the mortgage alive contrary to the general rule. Thus, it has been said that perhaps if the executor were to die or be removed before any decree of distribution or satisfaction of such decree, and it should turn out that, though he had credited his debt as assets, yet he had no means to pay and satisfy the amount due on his administration account, it might be held, in equity, in favor of the sureties on his administration bond, that the mortgage given to secure the same debt should not be deemed to be discharged.<sup>226</sup> So in a case where the material facts were that A.

<sup>221</sup> *Brown v. Harshman*, 9 Ohio Cir. Ct. R. 1; *James' Estate*, 3 Pa. Dist. R. 373.

<sup>222</sup> *Martin v. Smith*, 124 Mass. 112; *Ipswich Manuf'g Co. v. Story*, 5 Metc. (Mass.) 313.

<sup>223</sup> *Ipswich Manuf'g Co. v. Story*, 5 Metc. (Mass.) 313; *Tarbell v. Parker*, 101 Mass. 165.

<sup>224</sup> *Ipswich Manuf'g Co. v. Story*, 5 Metc. (Mass.) 313.

<sup>225</sup> See, also, *Winship v. Bass*, 12 Mass. 200.

<sup>226</sup> *Ipswich Manuf'g Co. v. Story*, 5 Metc. (Mass.) 313.



owning a piece of land mortgaged it to B. by an unrecorded mortgage, and by a second mortgage to C., who had no knowledge of the prior mortgage, A., after the first mortgage note was overdue, became the administrator of B., who had died, and as such administrator brought a bill to redeem against the assignee of the executors of C. The assignee defended on the ground that as A. was both debtor and administrator of B., and had charged himself with the mortgage debt in his inventory, the mortgage to B. was thereby discharged, and therefore could not be redeemed. But the court held that although, as between the administrator and the creditors or distributees of the estate, the mortgage was to be considered as discharged and the debt paid, yet this was a legal fiction, and as such should not be allowed to work injustice, and that in equity, as against the defendant, who bought his mortgage at sheriff's sale, subject to the complainant's mortgage, this mortgage would be considered still alive, so far as to allow the administrator to redeem the land.<sup>227</sup> The principle of this case, as explained in a later case, is that the creditors and distributees have a right to charge the executor or administrator with his debt in his accounts, as a means of collecting it from him, but that this is a right which they might waive, and which a court of equity would not compel them to assert when the results would be inequitable.<sup>228</sup> It is to be observed that the origin of the fiction of payment was in courts of equity, in order to obviate the injustice arising from the technical inability of an executor or administrator to sue himself at common law; and, the origin of the fiction being in equity, its application will be governed by equitable considerations in courts of equity, so as not to result in injustice.<sup>229</sup>

It has been attempted to extend this principle to assignees of the mortgage, or grantees of the land. Thus, in one case land subject to a mortgage was conveyed, so subject, and the grantee agreed, as part consideration for the deed, to assume and pay the debt as his own, and save the grantor harmless and indemnified therefrom. Afterwards the grantee was appointed executor of one to whom the mortgage had been assigned, and returned the mortgage as assets

<sup>227</sup> *Kinney v. Ensign*, 18 Pick. (Mass.) 232.

<sup>228</sup> *Leland v. Felton*, 1 Allen (Mass.) 534.

<sup>229</sup> See *supra*, p. 242.

of the estate in his inventory, and charged himself with the amount in his final account. The land was then attached by a personal creditor of the executor. Then the executor, as executor, entered for breach of condition of the mortgage, and assigned the mortgage to a third person for full value, and used the proceeds to pay legacies. The attaching creditor then brought a writ of entry against this third person, on the theory that when the executor charged himself with the mortgage it was thereby discharged, and the executor then held the land, in his original title as grantee, clear of incumbrance. The court refused to entertain this theory, because the fact was that the executor of the holder of the mortgage was not the debtor of such holder; that the agreement in his deed that he would pay the mortgage debt did not make him such debtor, but only gave his grantor a right of action against him, and created no privity with the mortgagee. The court further says that the rule of constructive payment will not be applied when it works substantial injustice, unless the case is brought strictly within it.<sup>230</sup>

<sup>230</sup> *Pettee v. Peppard*, 120 Mass. 522.

## CHAPTER XV.

### MANAGEMENT OF THE ESTATE.

109. Powers of Executors and Administrators before Grant of Letters.

109a. Collecting the Assets.

110. Waste.

111. Personal Obligations of Executor or Administrator.

112. Compromises and Arbitration of Disputed Claims.

113. Investment of Assets.

114. Taxation of Decedents' Estates.

### POWERS OF EXECUTORS AND ADMINISTRATORS BEFORE GRANT OF LETTERS.

109. Before appointment, neither an executor nor administrator can intermeddle with the estate, although an executor may do acts absolutely necessary to the preservation of the estate. After appointment, the title of both relates back to the death of the testator or intestate.

In England it has always been held that the title of the executor is derived from the will, and vests in him immediately upon the death of the testator, although probate of the will is necessary in order to provide legal evidence of the title, while the title of the administrator is derived wholly from the grant of letters of administration, and till such grant the title to the personal property remains in abeyance.<sup>1</sup> This origin of the title of an executor has led, in England, to the rule that an executor may exercise before probate most of the powers of his office, and vesting in him by reason of his title to the property of the deceased; for, as the probate of the will is only formal evidence of the title, such as is necessary to be produced in a court of law, it follows that any acts in pais may legally be performed by the executor before he has received such probate.<sup>2</sup>

<sup>1</sup> Williams, Ex'rs, 293, 302, 404.

<sup>2</sup> Wankford v. Wankford, 1 Salk. 306; Williams, Ex'rs, 302, 303. Thus it is said in England that an executor may, before probate, pay and receive debts, and make good releases therefor, Wankford v. Wankford, 1 Salk. 306; or may

As to an administrator, however, it is held in England that until the grant of letters an administrator has no title to the goods of the deceased, and he cannot sell and make a good title to any part of the estate, or receive payment of debts, and give a good discharge, or otherwise intermeddle with the estate, before he has received his appointment as administrator, and has qualified by giving the proper bond.<sup>3</sup>

The rule in the United States as to administrators coincides with the English rule as above stated, but in regard to executors there is a difference. In the United States the statutes which relate to the appointment of an executor to his office by the probate court, requiring him to give bond before he can enter into the duties of his office, and prohibiting any one from intermeddling with the estate until duly appointed by the probate court and qualified by giving bond, have the effect of restraining all action by one who is named as executor in the will, until he has been duly appointed by the probate court; and, even if the title to the property is held to be in the executor, he cannot assert it in any way before he receives his letters from the court.<sup>4</sup> Thus the court in a Pennsylvania case says: "At death, a man's property really passes into the hands of the law for administration, as much when he dies testate as when he dies intestate, except that in the former case he fixes the law of its distribution after payment of his debts, and usually appoints the persons who are to execute his will. But even this appointment is only provisional, and requires to be approved by the law before

collect the estate of the deceased, Godol. pt. 2, c. 20, § 1; and may enter peaceably into the house of the heir for that purpose, and may take specialties and other securities for the debts due to the deceased; or he may distrain for rent due to the testator; and if, before probate, the day occur for payment upon a bond made to or by the testator, payment must be made to or by the executor, though the will be not proved, upon like penalty as if it were. So he may sell or give away, or otherwise dispose of, goods or chattels of the testator before probate; he may assent to or pay legacies, may enter on the testator's term for years, and may gain a settlement by residing in the parish where the land lies. Williams, Ex'rs, 302, 303.

<sup>3</sup> Williams, Ex'rs, 405, 406.

<sup>4</sup> Shoenberger's Ex'rs v. Institution, 28 Pa. St. 459, 466; Rand v. Hubbard, 4 Metc. (Mass.) 252, 257; Echols v. Barrett, 6 Ga. 443; Gay v. Minot, 3 Cush. (Mass.) 354; Kittredge v. Folsom, 8 N. H. 110, 111; Stagg v. Green, 47 Mo. 500, 501.

it is complete, and therefore the title to the office of executor is derived rather from the law than the will.”<sup>5</sup>

It is said in *Rand v. Hubbard*,<sup>6</sup> by Mr. Chief Justice Shaw, that it may well be admitted that those powers which an executor has at common law before probate are to be considered as somewhat modified and restrained by the laws of Massachusetts and other states, requiring an executor to give bond before entering upon the duties of his office. In another case it was held that an executor could not, before probate, make a valid assignment of a mortgage and promissory note payable to the testator, and signed by the judge of probate, so as to release the judge from his debt, and qualify him to take probate of the will; the court holding that the assignment by the executor before probate was irregular, and effected no change of ownership.<sup>7</sup> Parker, J., in *Kittredge v. Folsom*,<sup>8</sup> says: “It may well deserve consideration whether, under our statute, which provides that no person shall intermeddle with the estate of any person deceased, or act as the executor or administrator thereof, or be considered as having that trust, until he shall have given bond to the judge of probate, an individual named executor can do any act as such until after probate of the will.”

A distinction has been attempted between such acts as originate in the executor, such as selling part of the estate or otherwise entering upon its administration before probate, and the merely passive representation of the estate so as to receive notice of nonpayment of a note at maturity on which the deceased was an indorser. It has been held in some cases that such a notice might be legally sent to the executor, and would then bind the estate, as will be seen in a succeeding paragraph;<sup>9</sup> but probably this is more from the necessity of the case than from any principle similar to the one above stated. If there is a doubt as to the validity of a will, or its due execution, and that point is in litigation, the executor named in the will certainly does not represent the estate, even as to receiving

<sup>5</sup> *Shoenberger's Ex'rs v. Institution*, 28 Pa. St 459, 466.

<sup>6</sup> 4 Metc. (Mass.) 257.

<sup>7</sup> *Gay v. Minot*, 3 Cush. (Mass.) 354. Cf. *Taylor v. Inhabitants*, 130 Mass. 494.

<sup>8</sup> 8 N. H. 110, 111.

<sup>9</sup> *Post*, notes 27, 28.

notices.<sup>10</sup> As to the administrator, until the grant of letters, he has no title to the goods of the deceased, and he cannot sell and make a good title to any part of the estate, or receive payment of debts and give a good discharge, or otherwise intermeddle with the estate, before he has received his appointment as administrator, and has qualified by giving the proper bond.<sup>11</sup> Yet any acts prior to such grant are confirmed and legalized by the subsequent grant of letters, if such acts were done by the administrator for the benefit of the estate.<sup>12</sup> Thus, where one receives payment of a debt, and then obtains letters of administration, he must account for the amount received; and if he gives a receipt and discharge of the debt when he receives payment, he cannot, after appointment as administrator, sue on the debt.<sup>13</sup> So, if one intermeddle with the estate, and do acts in its management which would subject him to an action of tort as executor de son tort, he legalizes those acts, and bars the action by subsequently taking administration.<sup>14</sup> But an administrator cannot pass a valid title to any portion of the estate before appointment, because his title to the property is derived wholly from his appointment;<sup>15</sup> but if he undertakes to sell personal estate before taking administration, and the sale is confirmed by both parties after administration is granted, and no intervening rights of third persons have accrued, the administrator can recover the price of the property sold from the purchaser.<sup>16</sup> Before the grant of letters, his acts have as much validity as those of an executor de son tort, which have been already discussed.<sup>17</sup>

<sup>10</sup> *In re Flandrow*, 92 N. Y. 256.

<sup>11</sup> *Williams, Ex'rs*, 405, 406.

<sup>12</sup> *Williams, Ex'rs*, 407.

<sup>13</sup> *Alvord v. Marsh*, 12 Allen (Mass.) 603; *Shillaber v. Wyman*, 15 Mass. 322; *Hatch v. Proctor*, 102 Mass. 353.

<sup>14</sup> *Shillaber v. Wyman*, 15 Mass. 324; *Andrew v. Gallison*, Id. 325, note. Cf. ante, p. 137, c. 9.

<sup>15</sup> *Williams, Ex'rs*, 405, 406.

<sup>16</sup> *Hatch v. Proctor*, 102 Mass. 353. But the administrator may disaffirm the sale and sue to recover possession of the goods, if they have been delivered to the other party. *Dutcher v. Dutcher*, 34 N. Y. Supp. 653, 88 Hun, 221.

<sup>17</sup> Ante, p. 137, c. 9. After the appointment is made by the probate court, his title relates back to the death of the decedent. *In re Richardson's Estate* (Surr.) 23 N. Y. Supp. 978.

*Notices, How Served before Appointment.*

Important questions arise in regard to the subject of serving notices and demands for or against the estate before an executor or administrator has been appointed; for instance, by whom, if a note fall due before any executor or administrator is appointed, the demand of payment should be made in order to hold the indorsers. Some authorities in England are to the effect that, if the deceased left a will, the executor ought to make a demand of payment in order to hold the indorsers, even though he has not yet proved the will, and qualified as executor.<sup>18</sup> Other authorities hold that there need be no demand until either an executor or administrator has been duly appointed, and that such executor or administrator has a reasonable time after his appointment wherein to make such demand.<sup>19</sup> In an early case in this country the subject was discussed in relation to the power of an executor appointed in New York to empower a notary in Massachusetts to make such demand without having proved the will in the latter state.<sup>20</sup> In a later case the facts were that the payee of a promissory note died before it was due. The executor named in the will found the note among the papers of the estate on the day on which it was due, not counting the three days of grace. About two weeks afterwards he requested the indorsers to waive their right to demand and notice, which they refused to do. Later still, the will was proved, but the executor renounced the trust, and never qualified, and an administrator with the will annexed was appointed, who immediately, upon finding the note, made demand of payment upon the maker, and, payment being refused, sent notice thereof to all the indorsers, and subsequently brought suit against them. The court held that, when the holder of a negotiable promissory note has died, and no executor or administrator has been appointed and qualified to act at its maturity, the indorsers remain liable, and will continue to be liable, if the presentment is made to the maker in a reasonable time after the due appointment of an executor or administrator, and notice of the dishonor of the note is seasonably sent to them afterwards.<sup>21</sup> A point

<sup>18</sup> Byles, Bills, 29; Chit. Bills (6th Ed.) 247.

<sup>19</sup> Bac. Abr. "Merchant," M, 7; Rosc. Bills, 147.

<sup>20</sup> Rand v. Hubbard, 4 Metc. (Mass.) 260, per Shaw, C. J.

<sup>21</sup> White v. Stoddard, 11 Gray (Mass.) 258.

involving the same question was discussed obiter in a case arising under the statutory liability of towns for accidents caused by defective highways, under a statute providing for a notice to be given to the town within a limited time by the person injured, or by any other person in his behalf. The injured person in this case—a minor—died within that time, and his father, having the right to administration, gave the notice, and was afterwards appointed administrator, and sued for the injury to his intestate. The court discussed the cases of *White v. Stoddard* and *Rand v. Hubbard*, and said that the inference from them was that, although it was not laches that demand and notice were not made at the maturity of the note, when there was no person legally authorized to collect the note, yet that a demand and notice at maturity by one who had the right to administer the estate, and who afterwards did administer it, would be sufficient. The court held that, under the above statute, the notice by the father was sufficient, but did not decide the case solely on the ground that he was entitled to administer, but rather upon the statute.<sup>22</sup> In case the maker of a note dies before maturity; the demand should be made upon the executor or administrator, if there is any, although it has been held that, if the note falls due within the year during which the executor or administrator is protected from all liability to pay debts, a demand would not be necessary to hold the indorser, since the demand would be fruitless, and an idle ceremony.<sup>23</sup> If the indorser is dead, his executor or administrator is entitled to the same notice of nonpayment as the deceased would have been entitled to.<sup>24</sup> A notice directed to "the estate of" A., and put into the post office, is not sufficient.<sup>25</sup> The holder of the note is bound to use only reasonable diligence to find out whether an executor or administrator of the indorser has been appointed or not.<sup>26</sup> If there has not been any administrator appointed, a notice

<sup>22</sup> *Taylor v. Inhabitants*, 130 Mass. 494.

<sup>23</sup> *Hale v. Burr*, 12 Mass. 87; *Burrill v. Smith*, 7 Pick. (Mass.) 291; *Oriental Bank v. Blake*, 22 Pick. (Mass.) 208.

<sup>24</sup> *Oriental Bank v. Blake*, 22 Pick. (Mass.) 208; *Massachusetts Bank v. Oliver*, 10 Cush. (Mass.) 560.

<sup>25</sup> *Massachusetts Bank v. Oliver*, 10 Cush. (Mass.) 560.

<sup>26</sup> *Massachusetts Bank v. Oliver*, 10 Cush. (Mass.) 560; *Goodnow v. Warren*, 122 Mass. 83.



to the person who is afterwards appointed administrator is not sufficient unless he is one of those interested in the estate;<sup>27</sup> but, if there is a will, and an executor who has not yet qualified, a notice to him will bind the estate, though he afterwards refuses to act as executor.<sup>28</sup>

### COLLECTING THE ASSETS.

**109a.** The executor or administrator, being given by law full power for the collection of the estate into his own possession, is bound to employ these powers with reasonable diligence, and to proceed to take possession of the personal property, and (in states where statutes give him the right) of the real property, and to collect the debts due the estate, and other claims, as soon as possible, without request from those interested in the estate.

If, therefore, he fails to do so, and by his negligence the estate suffers loss,—as, for instance, if he fails to bring suit to collect a debt due to the estate until after the statute of limitations has barred such a suit,—he is liable for the amount of the debt.<sup>29</sup> Statutory enactments exist in most states providing that upon complaint made to a probate court by an executor, administrator, or other person interested in the estate of a person deceased against any one suspected of having fraudulently concealed or embezzled any of the estate, the court may issue summary process for the examination of such person and the collection of the estate from him. When a person is cited under such a statute to appear in the probate court, and

<sup>27</sup> *Mathewson v. Bank*, 45 N. H. 104.

<sup>28</sup> *Goodnow v. Warren*, 122 Mass. 82; *Shoenberger's Ex'rs v. Institution*, 28 Pa. St. 459.

<sup>29</sup> *Harrington v. Keteltas*, 92 N. Y. 44; *Grant v. Reese*, 94 N. C. 720; *Sanderson v. Sanderson*, 20 Fla. 292; post, note 45. By statute it is enacted in some states that, if an executor or administrator unreasonably delays to raise money by collecting the debts and effects of the deceased, and in consequence of such delay or neglect the estate of the deceased is taken on execution by his creditors, such delay or neglect is unfaithful administration, and the executor or administrator will be liable in an action on his bond for all damages occasioned thereby.

be examined upon interrogatories, he may be assisted in making his answers by his legal adviser, if the probate judge thinks this is a proper procedure; but this privilege rests in the discretion of the court, and cannot be claimed as of right.<sup>30</sup> If the proceedings under such a statute are directed against the executor or administrator himself, as they may be, upon request of an interested party, it must be alleged either that he himself is concealing and refusing the inventory goods of the estate, or that some one else is so doing with his knowledge and collusion. It is not enough to allege only that some third party is concealing the goods, and that the executor or administrator has not inventoried them. Collusion of the executor with the person so concealing the goods must be alleged.<sup>31</sup> An executor is considered to be a trustee, by the directions of the will, for the benefit of those entitled under the will, and therefore he is also liable in equity for any departure from the trusts marked out in the will by the directions of the testator.<sup>32</sup>

#### SAME—WASTE.

**110. If an executor or administrator manages the estate in such a manner that assets are lost, or the rights of creditors or distributees are impaired, he is guilty of waste, and liable for the loss.**

The duty of the executor or administrator to administer the estate according to the will of the deceased, and according to law, is one whose breach gives rise to the rules as to waste. The action of *devastavit* has not so great importance in the United States as it had in England, since the remedy of injured parties upon the probate bond is generally more effective than the liability of the executor or administrator in the common-law action; but the rules as to waste coincide for the most part with the rules as to what is a breach of the probate bond, so that, on this ground, the rules as to waste still have a practical importance in the probate law of the United States.

<sup>30</sup> *Martin v. Clapp*, 99 Mass. 470.

<sup>31</sup> *Hignutt v. Cränor*, 62 Md. 218.

<sup>32</sup> *Mucklow v. Fuller*, Jac. 198; *Saunderson v. Stearns*, 6 Mass. 37; *Hall v. Cushing*, 9 Pick. (Mass.) 395; *Carson v. Carson*, 6 Allen (Mass.) 397, 399.

The liability for mismanagement of the estate which constitutes waste is said to depend upon two principles: First. That, in order not to deter persons from undertaking these offices, the court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight grounds. Second. That care must be taken to guard against an abuse of the trust.<sup>33</sup>

It would be impossible to enumerate all the cases in which the executor or administrator may be guilty of mismanaging the estate, and, therefore, of waste; but some of the more ordinary forms may be given. For willfully and wantonly or fraudulently wasting the assets, the executor or administrator is liable; as, for instance, if he pays his own debts with money of the estate,<sup>34</sup> or if he sells the goods at an undervalue collusively.<sup>35</sup> It will be seen that there are specific rules regarding the payment of debts, due by the estate, both as to the order and time of payment and also regarding the distribution of the estate among the legatees or distributees. These rules prescribe the duties of the executor or administrator; and any mismanagements of the estate, such as paying for undue funeral expenses, or paying debts which he ought not to pay, is a waste which the executor or administrator will be obliged to make up.<sup>36</sup> If an executor or administrator release debts due to the estate, or discharge or compound them, or cancel a bond due to the deceased, he may render himself liable for the whole debt, if the transaction is not for the benefit of the estate, unless he does it by the sanction of a decree of the probate court,

<sup>33</sup> Williams, Ex'rs, 1797; Powell v. Evans, 5 Ves. 843; Raphael v. Boehm, 13 Ves. 410.

<sup>34</sup> Williams, Ex'rs, 937.

<sup>35</sup> Went. Off. Ex'r, 302; Pinckard v. Woods, 8 Grat. (Va.) 140; In re Saltus, 3 Abb. Dec. (N. Y.) 243; Chapin v. Waters, 110 Mass. 195. So if he neglects to redeem pledged assets of the estate, if they are of more value than the sum for which they are pledged, and he has assets to redeem them. Prior v. Davis (Ala.) 19 South. 440; Chorn v. Chorn's Adm'r (Ky.) 33 S. W. 1107

<sup>36</sup> Cobb v. Muzzey, 13 Gray (Mass.) 58, 59; Moye v. Albritton, 7 Ired. Eq. (N. C.) 62; Place v. Oldham's Adm'r, 10 B. Mon. (Ky.) 400. Cf. post, c. 17, as to payment of debts; Id. c. 18, as to payment of legacies; Id. c. 19, as to distribution of estate.

as he may by statute in most states.<sup>37</sup> He may be also guilty of waste if he submits a doubtful claim to arbitration, and the arbitrators award him less than is due,<sup>38</sup> unless, previous to submitting the claim to arbitration he applies to the probate court, and is protected by a decree allowing such arbitration.<sup>39</sup> The executor or administrator may, however, in any of these cases, show that what he has done was for the benefit of the estate; and, if he does, this excuses him from answering the debt out of his own pocket.<sup>40</sup> In regard to submissions to arbitration and compromises of claims in favor of the estate, and the liability incurred by such proceedings, the modern rule is that, if the submission or compromise is made under the authority of the probate court, under the statutes allowing such authorization, it is conclusively presumed to be for the benefit of the estate, and cannot be afterwards objected to; while, if it is made by the executor or administrator without such authority, but by his common-law power, the burden of excusing himself by showing how the arbitration or compromise benefited the estate lies upon him.<sup>41</sup>

Questions have arisen as to what the executor or administrator may do as to assets outside the state in which he was appointed. It has already been seen that, if administration is taken out by another in the state in which the assets in question are, he has nothing to do with them, but should leave them to the local administration.<sup>42</sup> If he himself takes out such local administration, the ordinary rules apply, but if, without taking out such admin-

<sup>37</sup> Went. Off. Ex'r, 304; Mass. Pub. St. c. 142, §§ 4, 12-17; *De Diemar v. Van Wagenen*, 7 Johns. (N. Y.) 404. See post, p. 267.

<sup>38</sup> Went. Off. Ex'r, 304; *Yard v. Eland*, 1 Ld. Raym. 369. Cf. post, p. 267.

<sup>39</sup> Mass. Pub. St. c. 142, § 12. See the statutes of the states passim, and post, p. 267.

<sup>40</sup> *Blue v. Marshall*, 3 P. Wms. 381; *Pennington v. Healey*, 1 Crompt. & M. 402.

<sup>41</sup> *Wills v. Rand's Adm'rs*, 41 Ala. 198; *Nelson's Adm'r v. Cornwell*, 11 Grat. (Va.) 724; *Chase v. Bradley*, 26 Me. 531; *Chadbourn v. Chadbourne*, 9 Allen (Mass.) 173, 174; *Coffin v. Cottle*, 4 Pick. (Mass.) 454; *Wyman's Appeal*, 13 N. H. 18, 20; *Chouteau v. Suydam*, 21 N. Y. 179; *In re Scott*, 1 Redf. Sur. (N. Y.) 234; *McDaniels v. McDaniels*, 40 Vt. 340.

<sup>42</sup> Ante, p. 151, c. 10.

istration, he undertakes the management of such assets, he must be guided by such prudence and discretion as would ordinarily be used by business men. He should reduce the assets to money, and take them into the state of principal administration with as little delay as possible; but if, for the sake of realizing full value on their sale, he thinks it best even to expend upon them some of the money of the principal administration, he may do so, but only in the exercise of a sound business discretion, and not in any speculative or flighty venture.<sup>43</sup>

Carelessness, negligence, or delay in administration, by which the rights of creditors, legatees, or distributees become impaired, is a very common species of waste. Thus, if an executor or administrator allows a debt, payable by the estate with interest, to run on after he might have paid it legally, and had assets so to do, it is waste as to the interest.<sup>44</sup> So, if he delays suing for a debt until the statute of limitations has barred it, or the debtor becomes insolvent or absconds, he is chargeable with the debt,<sup>45</sup> unless the delay is excusable under the circumstances.<sup>46</sup> So, if he neglects for a long time to collect a debt, he may be chargeable with it, whether it remains collectible or not;<sup>47</sup> and if he allows arrears of rent to remain outstanding and uncollected for several years, he may be chargeable with them.<sup>48</sup> So, if he neglects to record a mortgage made to the estate, and so loses the debt, he is chargeable.<sup>49</sup> So, if he sells an equity, and then pays part of the mort-

<sup>43</sup> Shinn's Estate, 30 Atl. 1026, 1030, 166 Pa. St. 121, where this question is fully and ably discussed. Cf. Braunsdorf's Estate (Sup.) 37 N. Y. Supp. 229.

<sup>44</sup> Seaman v. Everad, 2 Lev. 40; Forward v. Forward, 6 Allen (Mass.) 499. Cf., also, Prior v. Davis (Ala.) 19 South. 440.

<sup>45</sup> Hayward v. Kinsey, 12 Mod. 573, per Holt, C. J.

<sup>46</sup> Thomas v. White, 3 Litt. (Ky.) 177; In re Child's Estate, 26 N. Y. Supp. 721, 5 Misc. Rep. 560; In re Stong's Estate, 28 Atl. 480, 160 Pa. St. 13. But if the suit to collect the debt would have been fruitless, as if the debtor is insolvent, there is no waste. In re Johnston's Estate (Sup.) 26 N. Y. Supp. 966; Powell v. Hurt, 17 S. W. 985, 108 Mo. 507.

<sup>47</sup> Oglesby v. Howard, 43 Ala. 144; Long's Estate, 6 Watts (Pa.) 46; Scarborough v. Watkins, 9 B. Mon. (Ky.) 540; Stark v. Hunton, 3 N. J. Eq. 300; Schultz v. Pulver, 11 Wend. (N. Y.) 361; Cartwright v. Cartwright, 4 Hayw. (Tenn.) 134.

<sup>48</sup> Tebbs v. Carpenter, 1 Madd. 290.

<sup>49</sup> Lindsley v. Dodd (N. J. Ch.) 30 Atl. 896. If an executor employs the same

gage debt, and neglects to collect this sum from the purchaser of the equity.<sup>50</sup> In all the foregoing instances of waste, the case depends largely upon the facts and circumstances under which the executor or administrator acted; and the court will not necessarily follow any precedent, unless it is exactly parallel in circumstances, but will decide whether the conduct of the executor or administrator in the particular case before it amounts to waste.

As to goods or chattels of the estate which have come into the hands of the executor or administrator, and have afterwards been lost by fire, theft, or other casualty, the rule at common law was that the executor or administrator was liable for the loss;<sup>51</sup> but in equity the rule was different, and it is now held that, where goods are stolen or lost or destroyed by accidental fire or other casualty, without the fault of the executor or administrator, he is not to be charged with this loss, but it must be borne by the estate.<sup>52</sup> This rule, however, would not be followed in cases where the loss was of such a nature as might have been covered by an insurance policy, and would have been so covered by a prudent man in the course of his own business, and there is money in the hands of the executor or administrator sufficient to purchase a policy therefor, for the duty of the executor or administrator in such case would be to insure the property against loss, so that, in case of loss, the estate would not suffer.<sup>53</sup>

In fine, the executor or administrator is liable for waste in every case where he departs from the rules of administering the estate laid down by the will of the testator or by law.

#### *Liability of Husband of Executrix or Administratrix.*

At common law, before the statutes were enacted which allow married women to administer as if sole, the liability of the hus-

attorney to enter judgment upon a note as the deceased had employed, and he collects the amount and absconds, the executor is not responsible. *Webb's Estate*, 30 Atl. 827, 165 Pa. St. 330.

<sup>50</sup> *Swan's Estate*, 54 Mo. App. 17. So if he neglects to oppose an invalid claim where it is submitted to a referee, and it then becomes binding on the estate. *Matter of Saunder's Estate*, 23 N. Y. Supp. 829, 4 Misc. Rep. 28.

<sup>51</sup> *Crosse v. Smith*, 7 East, 258.

<sup>52</sup> *Croft v. Lyndsey*, Freem. Ch. 1.

<sup>53</sup> *Howard v. Francis*, 30 N. J. Eq. 444; *Rubottom v. Morrow*, 24 Ind. 202.

band of a married woman, executrix, or administratrix for her waste, in the absence of statutes regulating the subject, was that during her life he was liable for acts committed by her before or during coverture,<sup>54</sup> but, after her death, his liability as husband ceased;<sup>55</sup> but, if he became her executor or administrator, he was liable, as such, to an action based upon her waste;<sup>56</sup> and in equity he was liable for all assets which came into her hands or his own during coverture.<sup>57</sup> If he died, his estate was liable for such assets.<sup>58</sup> The wife, after the death of the husband, became responsible for his acts of waste during coverture, as well as her own.<sup>59</sup> An exception to this rule has made where the wife became executrix or administratrix after coverture by her husband taking letters out in her name against her consent. In such a case it was held in equity that, if she did not intermeddle with the administration of the estate in any way, she might, after his death, renounce the administration, and escape responsibility for his acts of waste.<sup>60</sup> Under the statutes found in most of the United States at the present day, permitting a married woman to act as executrix or administratrix as if sole, this liability of the husband above discussed does not arise.<sup>61</sup> In other states, however, the rules above stated would probably be followed.

## PERSONAL OBLIGATIONS OF EXECUTOR OR ADMINISTRATOR

### 111. Contracts entered into or liabilities incurred by an executor or administrator in the course of management of the estate are contracts and liabilities of

<sup>54</sup> *Kings v. Hilton*, Cro. Car. 603; *Bachelor v. Bean*, 2 Vern. 60; 1 Schoales & L. 266.

<sup>55</sup> *Kingham v. Lee*, 15 Sim. 401, 1 Schoales & L. 261.

<sup>56</sup> *Wheatly v. Lane*, 1 Saund. 219d, note; *Coward v. Gregory*, L. R. 2 C. P. 153.

<sup>57</sup> *Adair v. Shaw*, 1 Schoales & L. 243.

<sup>58</sup> *Adair v. Shaw*, 1 Schoales & L. 243; *Clough v. Bond*, 3 Mylne & C. 499; *Smith v. Smith*, 21 Beav. 385, 387.

<sup>59</sup> *Adair v. Shaw*, 1 Schoales & L. 243.

<sup>60</sup> 1 Rep. Husb. & Wife, 196.

<sup>61</sup> See ante, p. 99.

the executor or administrator, and not direct liabilities of the estate. Such contracts and liabilities may, however, indirectly affect the estate; as, if they are incurred in the proper management of the estate, the executor or administrator may pay the liabilities and perform the contracts, and will be allowed for such payment and the expenses of performance in his accounts.

The foregoing rules result from the rule that contracts and liabilities must relate to some person; and such liabilities as arise from his own personal acts, whether they consist of the incurring debts, the formation of new contract relations, or injuries done to third persons in the course of settlement of the estate, are contracts and liabilities of his own. In regard to contracts of the executor or administrator regarding the estate, the general rule is well established that an executor or administrator cannot bind the estate by any new contract he may make. If he borrows money for the purposes of the estate, and devotes it to the payment of debts due, or if he contracts for services valuable and important to it, which are rendered, he alone is directly liable therefor, and it will be for the probate court to determine whether he shall be allowed compensation in his accounts for the liability which he has incurred.<sup>62</sup> Thus, if one who is appointed executor hire a person after the death of the testator to take charge of certain portions of the estate, and afterwards declines the trust, and an administrator de bonis non is appointed, who receives the estate, this administrator cannot be sued by the person so hired, even if the

<sup>62</sup> Doolittle v. Willett (N. J. Err. & App.) 31 Atl. 385; Thomas v. Moore (Ohio Sup.) 39 N. E. 803; Neely v. Bair's Ex'r, 27 Atl. 777, 157 Pa. St. 417; Boggs v. Wann, 58 Fed. 681; Rich v. Sowles, 23 Atl. 723, 64 Vt. 408; Roscoe v. McDonald, 51 N. W. 939, 91 Mich. 270; Sims v. Stilwell, 3 How. (Miss.) 176; Nehbe v. Price, 2 Nott & McC. (S. C.) 328; Jones v. Jenkins, 2 McCord (S. C.) 494; McEldery v. McKenzie, 2 Port. (Ala.) 33; Underwood v. Milligan, 10 Ark. 254; Hailey v. Wheeler, 4 Jones (N. C.) 159; Greening v. Sheffield, Minor (Ala.) 276; Adams v. Adams, 16 Vt. 228; Kingman v. Soule, 132 Mass. 288, per Devens, J.; Shepherd v. Young, 8 Gray (Mass.) 152; Cronan v. Cotting, 99 Mass. 334; Williams, Ex'rs, 1774; Miller v. Williamson, 5 Md. 219; Pinckney v. Singleton, 2 Hill (S. C.) 343.



services rendered were beneficial to the estate, because the estate is not bound by the hiring, but only the executor who makes the contract.<sup>63</sup> So, if an executor or administrator enters into covenants in a deed or lease of portions of the estate, although he expressly does so in his representative character, yet he binds himself, and not the estate.<sup>64</sup> So, if an administrator makes a promise on good consideration relating to the estate, and thus binds himself personally, he does not thereby bind the estate in the hands of a succeeding administrator *de bonis non*.<sup>65</sup> So, if the deceased had made a contract for the erection of a building, the executor cannot bind the estate by a new contract.<sup>66</sup> Nor can he bind the estate by a promise to pay for an accountant's services in matters relating to the estate.<sup>67</sup> So, if the executor or administrator gives a note, he binds himself, and not the estate.<sup>68</sup>

An exception to the general rule of personal liability of the executor or administrator is that an executor or administrator binds the estate whenever an open account existing between the deceased and another is stated, and a balance struck by the creditor and the executor or administrator, and the latter promises to pay the balance. In such a case, although the promise to pay the account is the promise of the executor or administrator, and should be alleged as such, yet, since the cause of action arose during the lifetime of the testator or intestate, and is merely reduced to a certainty by the accounting and balance struck, the judgment is, in effect, a judgment only against the estate.<sup>69</sup> Under a will which directs the executor to carry on the testator's business, and pledges all the assets for the solvency of the business, creditors of the ex-

<sup>63</sup> *Luscomb v. Ballard*, 5 Gray (Mass.) 404; *Kingman v. Soule*, 132 Mass. 288.

<sup>64</sup> *Crane v. Brainard*, 2 Root (Conn.) 118; *Sumner v. Williams*, 8 Mass. 162; *Baldwin v. Timmins*, 3 Gray (Mass.) 302; *Osborne v. McMillan*, 5 Jones (N. C.) 109.

<sup>65</sup> *M'Beth v. Smith*, 3 Brev. (S. C.) 511; *Luscomb v. Ballard*, 5 Gray (Mass.) 403.

<sup>66</sup> *Chicago Lumber Co. v. Tomlinson*, 39 Pac. 694, 54 Kan. 770.

<sup>67</sup> *Yeakle v. Priest*, 1 Mo. App. Rep'r, 284.

<sup>68</sup> *Morehead Banking Co. v. Morehead*, 21 S. E. 190, 116 N. C. 410; *First Nat. Bank of White Sulphur Springs v. Collins* (Mont.) 43 Pac. 499.

<sup>69</sup> *Hagood v. Houghton*, 10 Pick. (Mass.) 154; *Kingman v. Soule*, 132 Mass. 288; *Luscomb v. Ballard*, 5 Gray (Mass.) 405; *Williams, Ex'rs*, 1772, 1773.

ecutor may look to the estate for their debts, if the executor is personally irresponsible.<sup>70</sup>

The rule results, from the foregoing statements, that whenever an action is brought against an executor or administrator upon a promise alleged to have been made by him after the death of the testator or intestate, he is chargeable in his own right, and not in his representative capacity.<sup>71</sup> Thus, if the declaration alleges that the defendant, as executor, was indebted to the plaintiff for money lent by the plaintiff to the defendant as executor, and that the defendant, in consideration thereof, as executor, promised to pay, this declaration charges the executor personally, and not as executor.<sup>72</sup> And the same is the judgment upon a declaration that the defendant, as executor, was indebted to the plaintiff for money had and received by the defendant as executor for the use of the plaintiff, and that the defendant, in consideration thereof, as executor, promised to pay.<sup>73</sup> So a count upon a promise by the defendant as executor, for use and occupation after the death of the testator, charges the defendant personally, and not as executor.<sup>74</sup> And so does a count alleging that the defendant, as executor, was indebted to the plaintiff for goods sold and delivered by the plaintiff to the defendant as executor, at his request; or a count for work done and materials for the same used and provided by the plaintiff for the defendant, as executor, at his request, and that the defendant, as executor, promised to pay.<sup>75</sup>

Since, then, it is only in a few exceptional cases that an executor or administrator can be charged in his representative capacity upon causes of action arising since the death of the deceased, or upon the promise of the executor or administrator as such, he should, in administering the estate, be careful not to incur obligations in excess of the assets, even for the legitimate purposes of administration. He may, however, as will be seen hereafter,<sup>76</sup> pay costs of administration prior to ordinary debts.

<sup>70</sup> *Willis v. Sharp*, 21 N. E. 705, 113 N. Y. 586. <sup>71</sup> *Williams, Ex'rs*, 1771.

<sup>72</sup> *Rose v. Bowler*, 1 H. Bl. 108.

<sup>73</sup> *Rose v. Bowler*, 1 H. Bl. 108; *Powell v. Graham*, 7 Taunt. 585, 586; *Ashby v. Ashby*, 7 Barn. & C. 444.

<sup>74</sup> *Wigley v. Ashton*, 3 Barn. & Ald. 101.

<sup>75</sup> *Corner v. Shew*, 3 Mees. & W. 350.

<sup>76</sup> *Post*, p. 318, c. 17.

If there is no consideration for the promise of the executor or administrator, it binds neither him nor the estate, but is a mere nudum pactum, and cannot be enforced against the estate, or the executor or administrator.<sup>77</sup>

*Promise to Pay Debt of Deceased—Consideration.*

There is a peculiar class of cases in which the executor or administrator promises to pay a debt which is due by the deceased; and the question arises how far the executor or administrator is personally bound by such a promise. Two things are important to be noticed in such a case: First. That the promise must be upon good consideration; and, second, that under the statute of frauds in most states such a promise must be in writing.

First as to the consideration. Forbearance by a creditor for a reasonable or certain time to sue on a debt due to him by the deceased is a sufficient consideration to charge personally an executor or administrator who promises thereupon to pay the debt.<sup>78</sup> In an English case, where two executors gave a promissory note, promising; as executors, to pay a sum of money on demand, with lawful interest, it was held that, by adding the interest, payment at a future day must be meant, and that an executor, by promising to pay a debt at a future day, makes the debt his own, since the delay on the part of the creditors to sue is a good consideration.<sup>79</sup> And, generally, when executors or administrators give promissory notes or bills of exchange, they bind themselves personally.<sup>80</sup> It is said that the having assets is a good consideration for a promise by an executor or administrator. So that, if he promises in writing that, in consideration of having assets, he will pay a particular debt of the deceased, he may be sued personally on this promise.<sup>81</sup> But this rule does not seem to be adopted in the United States. Perhaps it amounts to no more than this: that, if an executor admits assets, generally, he is bound to pay the debt of the testator; and he is

<sup>77</sup> *Shepherd v. Young*, 8 Gray (Mass.) 152.

<sup>78</sup> *Johnson v. Whitecott*, 1 Rolle, Abr. 24; *Hawes v. Smith*, 2 Lev. 122; *Templeton v. Bascom*, 33 Vt. 132; *Ball v. Felton*, 6 Jones (N. C.) 202.

<sup>79</sup> *Childs v. Monins*, 2 Brod. & B. 460. See *Austin v. Munro*, 47 N. Y. 360.

<sup>80</sup> *Ridout v. Bristow*, 1 Crompt. & J. 231; *King v. Thom*, 1 Term R. 489. *Contra*, *Troy Bank v. Topping*, 9 Wend. (N. Y.) 273.

<sup>81</sup> *Trewinian v. Howell*, Cro. Eliz. 91.

estopped afterwards to deny the existence of sufficient assets, just as he is bound by a judgment, which is considered a conclusive admission of assets, and which he is bound to satisfy out of his own estate, or as he is bound by giving a bond to pay debts and legacies, which is again a conclusive admission of assets, or by a submission to arbitration.<sup>82</sup>

*Same—Statute of Frauds.*

Secondly. As to the effect of the statute of frauds. This provision of statute is that no action shall be brought to charge an executor or administrator upon a special promise to answer damages out of his own estate, unless the promise upon which such action is brought, or some memorandum thereof, is in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.<sup>83</sup> The consideration of the promise need not be set forth or expressed in the writing signed by the person to be charged therewith, but may be proved by any legal evidence.<sup>84</sup> It is held in England that this statute applies to executors before they have taken probate of the will, because the executor is appointed by the testator, and derives his office from the will, and therefore is executor upon the death of the testator; but that, as to an administrator, the case is different, for, as he derives his official character from his appointment by the court, he is not protected by the statute; and, if he promises verbally to pay a debt of the estate out of his own estate upon good consideration, before grant of letters, he is bound thereby;<sup>85</sup> and, if he promises in writing, by a promissory note payable at a future day, and afterwards is appointed administrator, he is bound by the note, for the consideration is the forbearance to sue.<sup>86</sup> But, if such a note is given by one who never takes administration, and there is no consideration therefor, it is void, being nudum pactum.<sup>87</sup> In the United States, however, the executor would stand on the same footing as an administrator.<sup>88</sup>

<sup>82</sup> Post, p. 473, c. 23.

<sup>83</sup> See, generally, for the principles of law relating to the statute of frauds, Browne, St. Frauds.

<sup>84</sup> See Browne, St. Frauds.

<sup>85</sup> Tomlinson v. Gill, Amb. 330.

<sup>86</sup> Serle v. Waterworth, 4 Mees. & W. 9.

<sup>87</sup> Nelson v. Serle, 4 Mees. & W. 795.

<sup>88</sup> See ante, p. 263.

An executor is not liable personally for usurious interest received by him on a note made to the deceased, the executor not knowing of the usury.<sup>89</sup> But, if he seeks to enforce the usurious contract by claiming the face value of the loan, when in reality a less sum was advanced, the statutory penalties will be enforced by making a deduction from the amount to be recovered.<sup>90</sup>

*Continuing Trade of Deceased.*

The proper course of an executor or administrator as to continuing the trade of the deceased after his death will be considered in discussing the settlement of partnership estates.<sup>91</sup> It is sufficient in this place to say that a trade is not transmissible, but is ended by the death of the trader. The executor or administrator cannot carry it on unless expressly commanded to do so by the will.<sup>92</sup> If he does carry it on without such authority, he becomes personally liable to the creditors and to the estate for all losses; while, if the business is successful, he can make no profit, but all gains go to the estate.<sup>93</sup> If he becomes bankrupt in the course of the business so carried on without authority, the estate is not responsible for the trade debts, but creditors and the legatees of the estate can prove against him in bankruptcy for their respective claims; and, if any specific portions of the estate can be identified, they can be withdrawn from the estate of the bankrupt.<sup>94</sup> If there is a direction in the will to carry on the business, and a specific portion of the estate set apart for that purpose, that portion only will be subject to trade debts, and form part of the bankrupt estate, if the executor or administrator fails in the business.<sup>95</sup> If no specific portion is thus set apart, only that portion which is already engaged in the business will be properly continued in it.<sup>96</sup> Although an executor cannot carry

<sup>89</sup> Heath v. Cook, 7 Allen (Mass.) 59. <sup>90</sup> Gerrish v. Black, 104 Mass. 400.

<sup>91</sup> Post, p. 479, c. 23.

<sup>92</sup> Barker v. Parker, 1 Term R. 295; Williams, Ex'rs, 1892; or by statute, King v. Johnson, 23 S. E. 500, 96 Ga. 497.

<sup>93</sup> Ex parte Garland, 10 Ves. 119; Ex parte Richardson, 1 Buck, 209; Alsop v. Mather, 8 Conn. 584; Stedman v. Feidler, 20 N. Y. 437; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619.

<sup>94</sup> Ex parte Garland, 10 Ves. 119; Ex parte Richardson, 1 Buck, 209.

<sup>95</sup> Ex parte Garland, 10 Ves. 119; Ex parte Richardson, 1 Buck, 209.

<sup>96</sup> McNeillie v. Acton, 4 De Gex, M. & G. 744.

on a trade after the death of the trader unless directed to do so by the will, yet there are cases where, in order to wind up the business, it is necessary to buy and sell stock. Thus, where the executor of a wine cooper found it necessary to buy wines to refine the stock left by the testator so as to sell it at a proper value, he was held not to have become a trader.<sup>97</sup> Moreover, if the deceased left unfinished contracts,—for example, the building of a house,—the executors or administrators should proceed to finish the building.<sup>98</sup>

*Money Collected without Right.*

If an executor or administrator has collected money from third persons under a false claim that they were indebted to the estate, or that the money belonged to the estate, they can sue him personally for money had and received. Thus, where an employé of a fire department, hired for a limited time, assigned all his future wages to another, and the assignee died, and the administrator collected from the city all the wages not only due the fireman under the engagement existing when he made the assignment, but also under subsequent engagements, it was held that the assignor might recover back from the administrator, in an action of money had and received, all the wages earned under the engagements subsequent to the one existing at the time of the assignment; for the assignment of future wages was valid only as to wages to be earned under an existing contract, not under future contracts.<sup>99</sup> And so, if the executor or administrator receives securities from a debtor as a means of collecting the debt, and collects more than enough to pay the debt, the debtor can recover the surplus in an action for money had and received.<sup>100</sup> A gift may be recovered back by the donee from the executor or administrator if he wrongfully takes possession of it, claiming that it is part of the estate; but, if the gift is imperfect, and not valid, such

<sup>97</sup> Toller, 487; Garrett v. Noble, 6 Sim. 504. He must fulfill the conditions of a lease of the deceased. Wilcox v. Alexander (Tex. Civ. App.) 32 S. W. 561.

<sup>98</sup> Marshall v. Broadhurst, 1 Cromp. & J. 405. So he may lawfully spend such sums on repairs as may be necessary. In re Clos' Estate, 42 Pac. 971, 110 Cal. 494.

<sup>99</sup> Twiss v. Cheever, 2 Allen (Mass.) 40; Mulhall v. Quinn, 1 Gray (Mass.) 105.

<sup>100</sup> Cronan v. Cotting, 99 Mass. 334.

an action will fail,—as where a gift of money is intended, but never made by transfer of possession.<sup>101</sup>

## COMPROMISES AND ARBITRATION OF DISPUTED CLAIMS.

112. If an executor or administrator compromises or refers to arbitration a claim for or against the estate, unless by authority of the probate court, he does so at his peril; and, unless he can show that the proceeding was for the benefit of the estate, he is liable personally for such amount as the estate may have lost. By statute, probate courts are given power to authorize executors or administrators to compromise or arbitrate claims for or against the estate; and, if the executor or administrator acts under authority of the statute, he is protected. In some states the statutes prohibit compromises or arbitration unless under statutory authority.

Among the powers of executors and administrators at common law to enable them to administer the estate with more facility was given the power of submitting disputed claims to arbitration, or of compromising them.<sup>102</sup> In many states this power is re-enforced and affirmed by statute.<sup>103</sup> Such a statute sometimes does not change the power existing at common law, but only provides for a judicial sanction to such arbitration or compromise, if it is desired by the executor or administrator, in order to estop the parties who join in the proceedings from contesting them afterwards collaterally.<sup>104</sup> Other statutes require the sanction of the court before any compromise will be considered valid and binding.<sup>105</sup>

<sup>101</sup> *Gerry v. Howe*, 130 Mass. 351. Cf. ante, p. 228, c. 14.

<sup>102</sup> *Chadbourn v. Chadbourn*, 9 Allen (Mass.) 173; *Rogers v. Hand*, 39 N. J. Eq. 271, and note; *Wood v. Tunnichliff*, 74 N. Y. 42; *Alling v. Munson*, 2 Conn. 691; *Wheatley v. Martin's Adm'r*, 6 Leigh (Va.) 62; *Denney v. Parker*, 38 Pac. 1018, 10 Wash. 218.

<sup>103</sup> See the statutes of each state passim.

<sup>104</sup> *Chadbourn v. Chadbourn*, 9 Allen (Mass.) 173; *Chase v. Bradley*, 26 Me. 538; *Wood v. Tunnichliff*, 74 N. Y. 42.

<sup>105</sup> *Washington v. Railroad Co.*, 26 N. E. 653, 136 Ill. 49; *Hartigan v. South-*

The arbitrators have no power, under such a statute, if a claim against the estate is referred to them, to find a claim in favor of the estate which was not referred, but set up as a set-off.<sup>106</sup> Under such a statute a claim may be compromised by one of several joint executors, since they are all regarded as one person.<sup>107</sup> In some states the statutes require the submission to arbitration to be reasonable and advantageous to the estate, in which case the mere allegation of the attorney of the executor or administrator to this effect is not enough, but there must be other proof of the advantageousness of the compromise.<sup>108</sup>

An award or compromise made in writing, under statutory authority, in such case will, if found by the court to be just and reasonable in its effect upon any future contingent interests in said estate, be valid and binding upon such interests, as well as upon the interests of parties in being; and where it appears that such future contingent interests may be affected the court will generally appoint some suitable person or persons to represent such interests in such controversy, upon such conditions as to costs as may seem equitable to the court. Such a statute is not unconstitutional in allowing future contingent interests, especially of persons not yet in being, to be affected by the award.<sup>109</sup>

The liability of an executor or administrator upon a submission in general terms to arbitration, without stipulating that payment shall be made only from assets, is, as to the successful arbiter, for the full extent of the award from the former's own personal estate; for the general reference of the claim to arbitration, without saying that the payment shall depend upon his having assets, is considered to be an admission of assets sufficient to pay the award, whatever it may be.<sup>110</sup> A further provision of statute exists in some states, by which, in case of exorbitant claims, the court may

ern Pac. Co., 24 Pac. 851, 86 Cal. 142. So of the cancellation of a claim due to the estate. *Scott v. Scott*, 61 Ill. App. 103.

<sup>106</sup> *Gilmore v. Hubbard*, 12 Cush. (Mass.) 220.

<sup>107</sup> *Gilman v. Healy*, 55 Me. 124. See ante, p. 174, c. 11.

<sup>108</sup> *Richardson's Estate* (Surr.) 9 N. Y. Supp. 638; *Quinn's Estate*, Id. 550.

<sup>109</sup> *Clarke v. Cordis*, 4 Allen (Mass.) 466.

<sup>110</sup> *Pearson v. Henry*, 5 Term R. 7; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Giles v. Perryman*, 1 Har. & G. (Md.) 164.



appoint commissioners to adjudicate upon such claims, whose decision is final, unless appealed from.<sup>111</sup> And the appeal must be either by the administrator or executor or claimant, and not by any heir at law.<sup>112</sup> And the same object is effected in New York by a power given to the surrogate to order a reference of disputed claims.<sup>113</sup> This statute does not, as has been seen, affect the common-law right of executors or administrators to submit claims to arbitration.<sup>114</sup>

### INVESTMENT OF ASSETS.

- 113. Money coming to the hands of the executor or administrator as assets of the estate, and not to be used by him for purposes of the estate for some time, should be invested by him in order that the estate may have the benefit of interest on the money. If he does not invest, he is liable personally for interest. His liability for injudicious investments is similar to that of a trustee.**

It is generally the duty of an executor or administrator to invest the money remaining in his hands after the payment of debts, or at other times, if he cannot pay it over to those entitled to it.<sup>115</sup> He is allowed a reasonable time in which either to make such payments or to invest the funds in his hands, which, as a rule, is held to be six months from the settlement of his accounts.<sup>116</sup> If the executor or administrator does not make his investments in that time, and there is no good reason why he should not, he is held to be negligent, and will be charged with interest from the time when he should have made the investment.<sup>117</sup> But, if the sums

<sup>111</sup> Me. Rev. St. c. 64, § 53; *Rogers v. Rogers*, 67 Me. 456.

<sup>112</sup> *Burrows v. Bourne*, 67 Me. 227.

<sup>113</sup> N. Y. 3 Rev. St. (7th Ed.) p. 2299, § 36.

<sup>114</sup> *Wood v. Tunnicliff*, 74 N. Y. 43.

<sup>115</sup> *King v. Berry*, 3 N. J. Eq. 261; *Frey v. Frey*, 17 N. J. Eq. 71.

<sup>116</sup> *Frey v. Frey*, 17 N. J. Eq. 71.

<sup>117</sup> *Frey v. Frey*, 17 N. J. Eq. 71; *In re Young's Estate* (Iowa) 66 N. W. 163; *In re Child's Estate*, 26 N. Y. Supp. 721, 5 Misc. Rep. 560; *Fow's Estate*, 3 Pa. Dist. R. 316; 2 Kent, Comm. 231; 2 Story, Eq. Jur. § 1277; *Hill, Trustees*, p. 374, note 1.

are small,<sup>118</sup> or the time which he is to hold them is short, so that a temporary investment would not be profitable for the estate, he will not be charged with interest, unless he has appropriated the money to his own use.<sup>119</sup> Moreover, if he is obliged to keep the money ready for a settlement of the estate, he will not be charged with interest, as where distribution was only prevented by a quarrel among the distributees, and the administrator might have been called upon to make distribution at any time if they had come to an agreement.<sup>120</sup>

In England certain forms of investment have been authorized by law, and an investment in these is protected, even though the securities should depreciate in value;<sup>121</sup> and investments outside of the authorized securities render the executor or administrator liable for a fall in the value of the investments, even though he has acted in good faith.<sup>122</sup> In some of the United States similar authorized investments for trust funds exist, and the English rules as to liability then apply.<sup>123</sup> In other states the rule is that, if the investment is made in good faith, and with sound discretion at the time of the investment, the trustee is not liable for loss,<sup>124</sup> for an executor or trustee does not guaranty the security of investments, but is protected if he acts as an ordinarily prudent man would act in the case of his own estate.<sup>125</sup> In New Jersey the investment may be on mortgage, at the highest rate of interest procurable, or in United States or New Jersey state bonds,<sup>126</sup> but not in municipal bonds or bank stock.<sup>127</sup> Funds of the estate should not be in-

<sup>118</sup> *In re Butler's Estate* (Surr.) 9 N. Y. Supp. 641.

<sup>119</sup> *Coggins v. Flythe*, 18 S. E. 96, 113 N. C. 102; *In re Essex's Estate* (Surr.) 20 N. Y. Supp. 62.

<sup>120</sup> *Howard's Estate*, 23 N. Y. Supp. 836, 3 Misc. Rep. 170.

<sup>121</sup> *Peat v. Crane*, 2 Dickens, 499, note; *Franklin v. Frith*, 3 Brown, Ch. 434.

<sup>122</sup> *Hancom v. Allen*, 2 Dickens, 498; *Howe v. Earl of Dartmouth*, 7 Ves. 150.

<sup>123</sup> *Ante*, notes, 121, 122.

<sup>124</sup> *Perry, Trusts*, §§ 459, 510, 511; *Gray v. Lynch*, 8 Gill (Md.) 405; *McCoy v. Horwitz*, 62 Md. 189; *Harvard College v. Amory*, 9 Pick. (Mass.) 446, 461; *Lovell v. Minot*, 20 Pick. (Mass.) 116, 117.

<sup>125</sup> *McCabe v. Fowler*, 84 N. Y. 318.

<sup>126</sup> *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Halsted v. Meeker*, 18 N. J. Eq. 136, 140; Supp. Revision, "Orphans' Court," § 17.

<sup>127</sup> *Tucker v. Tucker*, 33 N. J. Eq. 235.

vested on personal security.<sup>128</sup> In Maryland it has been held that the statute which gives the probate court power to authorize an investment by an executor or administrator in bank stock or other good security furnishes by analogy a protection for an executor who has in good faith invested in such stock without the protection of an order of the court.<sup>129</sup> In New Jersey a statute provides that an executor may continue the investments of his testator without liability for loss, if he does so in good faith, and in the exercise of a sound discretion.<sup>130</sup>

The most prudent course in any case where a surplus fund is on hand is to apply to the probate court for an order directing a temporary investment, which order the court has power to make, either by statute or as incident to its general powers. The object of such statutes is not to confer any new power upon the executor or administrator, but to afford him a protection in the exercise of his power of investment; for, if he follows the order of the court upon due proceedings, he is not liable for loss.<sup>131</sup>

While waiting for the time to pay over the money to creditors or distributees or to make investment of it, an executor or administrator may deposit it in his official capacity in a bank of good standing, without liability for loss if the bank fails.<sup>132</sup> But if he leaves it standing a long time in the bank, and pays debts with his own funds, and the bank uses the money as its working capital, he being president, he will be personally liable if the bank fails.<sup>133</sup>

<sup>128</sup> *Lefever v. Hasbrouck*, 2 Dem. Sur. (N. Y.) 567.

<sup>129</sup> *McCoy v. Horwitz*, 62 Md. 189; *Gray v. Lynch*, 8 Gill (Md.) 419.

<sup>130</sup> Supp. Revision, "Orphans' Court," § 18; *Coddington v. Stone*, 36 N. J. Eq. 363.

<sup>131</sup> Md. Code, art. 50, § 12; Mass. Pub. St. c. 156, § 32; N. J. Revision, "Orphans' Court," §§ 115, 116; *Brightly's Purd. Pa. Dig. "Decedents' Estates,"* §§ 101-103; *Spellier's Estate*, 17 Pa. Co. Ct. R. 286; *Twaddell's Appeal*, 5 Pa. St. 17.

<sup>132</sup> *Cox v. Roome*, 38 N. J. Eq. 259; *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *Norwood v. Harness*, 98 Ind. 134. But if he deposit it in his own name he is liable for any loss. *Succession of Milmo*, 16 South. 772, 47 La. Ann. 126; *Allen v. Leach* (Del. Orph.) 29 Atl. 1050; *Estate of Arguello*, 31 Pac. 937, 97 Cal. 196.

<sup>133</sup> *In re McKay*, 25 N. Y. Supp. 725, 5 Misc. Rep. 123; *Woodley v. Holley*, 16 S. E. 419, 111 N. C. 380. As to the duty of depositing in a bank which allows interest on deposits, see *In re Clark's Estate* (Surr.) 39 N. Y. Supp. 722.

The rate of interest charged for mere neglect to invest is generally simple, although, if circumstances exist which render compounding the interest proper, it will be so ordered;<sup>134</sup> for instance, where the executor was directed by the will to put money out at interest, and pay the interest yearly to a beneficiary, it was held that interest should be computed on the overdue interest provided for by the will.<sup>135</sup> It is for the court to say in every instance whether the circumstances are such that the money ought to have been invested.<sup>136</sup> And if the executor or administrator retaining the money lends it, or buys stocks, etc., for himself, or uses it in his own business, and thus makes a personal profit out of the interest, interest should be compounded. The periods at which it should be compounded—that is, whether six months or annually—depend upon the amount of the interest which the sums retained would have produced if properly invested. If this amount would have been sufficiently large every six months to be easily invested, interest should be reckoned at six months' rests, otherwise at yearly rests.<sup>137</sup> The rate at which interest should be reckoned is the current legal rate. In England and in some states variation from the rate is allowed on equitable considerations; in other states it is not.<sup>138</sup> Where the executor or administrator uses the money for his own purposes, he is supposed to have made the legal rate

<sup>134</sup> *Frost v. Denman*, 2 Atl. 926, 41 N. J. Eq. 48; *McKnight's Ex'rs v. Walsh*, 23 N. J. Eq. 147; *Frey v. Frey's Adm'rs*, 17 N. J. Eq. 74; *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620; *Barney v. Saunders*, 16 How. 542; *Berwick-upon-Tweed v. Murray*, 7 De Gex, M. & G. 497; *Robinson v. Robinson*, 1 De Gex, M. & G. 247.

<sup>135</sup> *Lathrop v. Smalley's Ex'rs*, 23 N. J. Eq. 195.

<sup>136</sup> *In re Gloyd's Estate* (Iowa) 61 N. W. 975; *Hetfield v. Debaud* (N. J. Perog.) 34 Atl. 882.

<sup>137</sup> *In re Hilliard*, 23 Pac. 393, 83 Cal. 423; *In re Clary's Estate* (Cal.) 44 Pac. 569; *Eastman v. Davis* (Vt.) 35 Atl. 73; *Frey v. Frey's Adm'rs*, 17 N. J. Eq. 74; *Barney v. Saunders*, 16 How. 542; *McKnight v. Walsh*, 23 N. J. Eq. 147; *Voorhees' Adm'rs v. Stoothoff*, 11 N. J. Law, 145. Cf. *Reilly v. Reilly* (Mo. Sup.) 34 S. W. 847.

<sup>138</sup> *Frey v. Frey's Adm'rs*, 17 N. J. Eq. 74. See post, note 141. Seven per cent. has been charged when a trust company executor mingled the funds with its own. *St. Paul Trust Co. v. Kittson* (Minn.) 65 N. W. 74.

of interest on it.<sup>139</sup> And it has even been held that in such cases he should be charged with annual rests.<sup>140</sup> But in England, when the executor has acted in good faith, he has been charged only 4 per cent., the legal rate being 5 per cent.; and in New York 6 per cent. has been charged when a higher rate was current.<sup>141</sup> In one case the court held that the administrator should be charged 4 per cent. from one year after his appointment till the time when the estate ought to have been divided up, and 6 per cent. after that time; it appearing that there was no reason why the money should not have been invested during that time.<sup>142</sup>

### TAXATION OF DECEDENTS' ESTATES.

114. For the taxation of estates of deceased persons the following are the principal rules:

(a) The place of taxation varies in the several states.

It may be—

(1) Where the executor or administrator resides.

(2) Where the deceased resided.

(3) Where the probate court is, in which the estate is being administered.

(b) The amount to be taxed is—

(1) In some states, the whole estate, less debts.

(2) In other states, the whole estate.

(c) The assessment must be to the executor or administrator.

The mode of taxation of the estate of a deceased person varies of course, with the statutes of different states, so much so that any attempt to treat fully of this subject would be beyond the limits of this book. Some of the main features, however, of the subject of taxation are similar in many states, and have been the subject

<sup>139</sup> *In re Meikle's Estate* (Surr.) 20 N. Y. Supp. 88; *Attorney General v. Alford*, 4 De Gex, M. & G. 843; *Burdick v. Garrick*, 5 Ch. App. 241.

<sup>140</sup> *Foster's Ex'x v. Stone*, 31 Atl. 841, 67 Vt. 336; *Mades v. Miller*, 2 App. I. C. 455.

<sup>141</sup> *King v. Talbot*, 40 N. Y. 95; *Adair v. Brimmer*, 74 N. Y. 555.

<sup>142</sup> *Almy v. Probate Court*, 30 Atl. 458, 18 R. I. 612.

of judicial decision, and some observations will be made upon these points.

A difference exists between the statutes of the various states in regard to the place at which the tax on the personal property of the estate should be assessed. If no specific statutory provision on this subject exists, the personal property should be assessed to the executor or administrator in the place where he resides, the property being his, although in a qualified right; and this is generally the rule enacted by statute.<sup>143</sup> In some states, however, it is provided by statute that the tax shall be assessed upon the personal estate in the place where the deceased owner last dwelt.<sup>144</sup> Personal estate includes national bank stock.<sup>145</sup> In other states a still different result is arrived at by considering that the personal property should be taxed wherever it is found, and that the presumption is that, the property being in the probate court for settlement of the estate, the personal property should be taxed where the probate court is, which is generally the county where the deceased last dwelt.<sup>146</sup>

The time of assessment is fixed generally by statute, and to this date the assessment, when it is completed, relates.<sup>147</sup>

The amount of property to be taxed is generally the whole personal estate, less any debts due by the estate; or, in other words, the real value of the property.<sup>148</sup> In some states, however, the whole property is assessed, and, if any debts are due by the estate, they are taxed to the creditor, if the amount is fixed, or if any amount is admitted to be due by the executor or administrator.<sup>149</sup>

It is generally held that the tax is illegally assessed, and not collectible, if it is assessed to "the estate of" the deceased, after an executor or administrator has been appointed,<sup>150</sup> or if it is assessed

<sup>143</sup> *Ely v. Collector of Holmdel Tp.*, 39 N. J. Law, 79. See the statutes of each state for specific provisions, and *Nelson v. Becker* (Minn.) 65 N. W. 119.

<sup>144</sup> Mass. Pub. St. c. 11, § 20, cl. 5; *Hardy v. Inhabitants*, 6 Allen (Mass.) 282.

<sup>145</sup> *Revere v. City of Boston*, 123 Mass. 375.

<sup>146</sup> *Bonaparte v. Mayor, etc.*, 63 Md. 470. Cf. ante, p. 44, c. 3.

<sup>147</sup> *Holmes v. Taber*, 9 Allen (Mass.) 246.

<sup>148</sup> *People v. Tax Com'rs*, 1 N. E. 401, 99 N. Y. 157.

<sup>149</sup> *Deane v. Hathaway*, 136 Mass. 130.

<sup>150</sup> *Wood v. Torrey*, 97 Mass. 321; *Inhabitants of Fairfield v. Woodman*, 76 Me. 549; *Ely v. Collector of Holmdel Tp.*, 39 N. J. Law, 79.

to the executor or administrator after the estate has been distributed, and notice thereof given to the assessors; and this is true although no account is filed in the probate court, and the distribution is an informal one, by agreement of all parties interested in the estate.<sup>151</sup> A mere error in assessment, by which the tax is assessed to administrators when they are in fact executors, does not invalidate the tax.<sup>152</sup> It seems that, inasmuch as an executor is regarded as having title to the property of the deceased under the will, and not by virtue of his appointment by the court, the tax may be assessed to him before his appointment.<sup>153</sup> A legacy cannot be assessed to a legatee before payment.<sup>154</sup>

Taxes are made preferred debts in most states, and the money paid by the executor or administrator for taxes on personal property is allowed in his accounts,<sup>155</sup> but not for taxes on real estate, unless he has charge of it.<sup>156</sup> It is the duty of the executor or administrator to find out what taxes are due upon the estate, and pay them. The tax, being a preferred claim, is not a debt which is covered by the statute requiring creditors of the estate to exhibit their claims; but, as there is generally a notification of assessment sent to the taxpayer, this is usually sufficient to prevent the estate from being sold through the inadvertence of the executor or administrator.<sup>157</sup> The collector of taxes cannot make a distress for a tax assessed to the deceased before his death, but must rely on his action of contract;<sup>158</sup> but he may for a tax assessed upon the estate after the death of the owner.<sup>159</sup> An action for taxes is barred by the statute of limitations, as are all ordinary debts.<sup>160</sup>

<sup>151</sup> *Carleton v. Inhabitants*, 102 Mass. 348.

<sup>152</sup> *Bath v. Reed*, 4 Atl. 688, 78 Me. 276.

<sup>153</sup> *Smith v. President, etc.*, 4 Cush. (Mass.) 1.

<sup>154</sup> *Herrick v. City of Big Rapids*, 19 N. W. 182, 53 Mich. 554.

<sup>155</sup> *Holmes v. Taber*, 9 Allen (Mass.) 246. See post, p. 323, c. 17.

<sup>156</sup> *Jennison v. Hapgood*, 10 Pick. (Mass.) 105; *Polhemus v. Middleton*, 37 N. J. Eq. 240.

<sup>157</sup> *Bonaparte v. State*, 63 Md. 470. Cf. post, p. 336, c. 17.

<sup>158</sup> *Wilson v. Shearer*, 9 Metc. (Mass.) 506. But the executor or administrator may lawfully pay such tax and be allowed for it in his accounts, if it is a personal debt of his decedent, or not a mere lien on the property. *In re Steward*, 35 N. Y. Supp. 366, 90 Hun, 94.

<sup>159</sup> *Smith v. Bank*, 4 Cush. (Mass.) 10.

<sup>160</sup> *Rich v. Tuckerman*, 121 Mass. 222.

*Succession Tax.*

In addition to the ordinary property tax, in some states a tax is laid upon the estate of a decedent as an inheritance or succession tax. Thus, in Maryland, a tax of  $2\frac{1}{2}$  per cent. on every \$100 of the estate after the payment of debts is laid upon every estate which descends to any other person than the father, mother, husband, wife, or direct lineal descendants of the deceased.<sup>161</sup> This tax is in that state made a lien on the land, and may be collected by sale of any of the estate.<sup>162</sup> And if the executor or administrator has paid over to any distributee his share of the estate without deducting therefrom the amount of this tax, that amount is held to be money had and received by the distributee to the use of the state, and may be recovered by the state in such an action.<sup>163</sup> Such a tax applies only to estates which are distributed in that state, as it is intended to tax the devolution of the property, and cannot be enforced if that act takes place out of the state.<sup>164</sup> The constitutionality of such a tax has been assailed, but it has always been sustained by the courts.<sup>165</sup>

*Tax on Commissions of Executor or Administrator.*

A further tax is laid in Maryland and some other states on the commissions of the executor or administrator.<sup>166</sup> This tax applies only to estates administered in Maryland. Accordingly, if a resident of Maryland dies, and administration is taken first in another state, and a debtor residing in Maryland pays his debt to the foreign administrator, the administrator in Maryland is not obliged to pay any tax on the commissions on such a payment.<sup>167</sup>

<sup>161</sup> Md. Rev. Code, art. 11, § 104 et seq.; *Montague v. State*, 54 Md. 482.

<sup>162</sup> Md. Rev. Code, art. 11, §§ 115, 118.

<sup>163</sup> *Montague v. State*, 54 Md. 482.

<sup>164</sup> *Citizens' Nat. Bank v. Sharp*, 53 Md. 531.

<sup>165</sup> *In re McPherson*, 10 N. E. 685, 104 N. Y. 316.

<sup>166</sup> Md. Rev. Code, art. 11, § 99 et seq.

<sup>167</sup> *Citizens' Nat. Bank v. Sharp*, 53 Md. 531.



## CHAPTER XVI.

### SALES AND CONVEYANCES OF PERSONAL OR REAL ASSETS.

- 115. Sales of Personal Property.
- 116-117. Sales of Real Estate to Pay Debts.
- 118. Power to Mortgage.
- 119. Power to Perfect Decedents' Conveyances.

### SALES OF PERSONAL PROPERTY.

115. The title to the personal property of the deceased vests in the executor or administrator, and he holds it upon the trust of paying debts and administering according to the will of the testator, or according to law. As the title is in him, he may, at common law, and unless restrained by statute, make a valid sale to third parties at any time or in any manner, without regard to any authorization of the probate court, and will give a good title to the purchaser, unless the sale is fraudulent. In many states, however, this power is restricted by statutes which require the executor or administrator to obtain an order of the probate court before he can sell the property.

The personal estate of a deceased person vests in his executor or administrator, as has been already seen. The executor or administrator is charged with the duty of paying the debts of the intestate; and, to accomplish this object, he has at common law, and unless restricted by statute, the power to sell the personal estate at any time, and in any manner, without any authorization from the probate court, provided the sale is bona fide and without fraud.<sup>1</sup>

This power to sell personal estate without license includes the

<sup>1</sup> Williams, Ex'rs, 933, 935; Whale v. Booth, 4 Term R. 625, note; Wolverhampton Bank v. Marston, 7 Hurl. & N. 148; Jelke v. Goldsmith (Ohio) 40 N. E. 167; Rayner v. Pearsall, 3 Johns. Ch. (N. Y.) 578; Hutchins v. Bank, 12 Metc. (Mass.) 424. And see Mechem, Cas. Succ. p. 171 et seq.

power to sell chattel interests in land, such as leases for terms of years,<sup>2</sup> or mortgages of land, or of personal property;<sup>3</sup> and the executor or administrator is not held by any implied warranty of title, although he would be personally liable if he expressly warrants, or if he is guilty of fraud in the sale.<sup>4</sup>

Although this power of selling the personal estate exists at common law, yet, for the protection of the executor or administrator, it is enacted by statute in some states that the probate court may, by order, license such sale, thereby estopping interested parties who have been duly notified from contesting the validity of the sale in a collateral action, or in the accounts of the executor or administrator.<sup>5</sup> Such a statute is for the protection of the executor or administrator, and does not deprive him of his common-law power of selling the personal property at his own risk, subject to having the sale disallowed in his accounts.<sup>6</sup>

In other states the power which an executor or administrator has at common law of selling the personal estate is restricted by statute, and he may sell it only when licensed by the probate court;<sup>7</sup> but this statutory prohibition applies only to the general powers of executors and administrators, and does not prevent a testator from giving his executor full power by his will to make sales.<sup>8</sup> If an executor or administrator is ordered to sell property for a price fixed by the court, and he sells for less, when he could have got the price fixed by the court, he is liable for the difference. Thus, where the court ordered an executor to sell promissory notes of a third party belonging to the

<sup>2</sup> *In re Gay*, 5 Mass. 419; *Amory v. Francis*, 16 Mass. 313.

<sup>3</sup> *Crooker v. Jewell*, 31 Me. 313; *Allender v. Riston*, 2 Gill & J. (Md.) 97. See post, note 17.

<sup>4</sup> *Mockbee v. Gardner*, 2 Har. & G. (Md.) 176.

<sup>5</sup> *Clark v. Blackington*, 110 Mass. 374. See local statutes for the specific provisions.

<sup>6</sup> *Id.*

<sup>7</sup> Maryland, Nevada, Oregon, South Carolina, and Texas. See statutes *passim*. *Citizens' St. Ry. Co. v. Robbins*, 26 N. E. 116, 128 Ind. 449. Cf. *Drovers' & Mechanics' Nat. Bank v. Hughes* (Md.) 34 Atl. 1012.

<sup>8</sup> *Trimble's Ex'r v. Lebus*, 22 S. W. 329, 94 Ky. 304. But in Maryland it is held that unless the power in the will contains the words "without order of this court," or their equivalent, the sale must be authorized by the court. *Brooks v. Bergner* (Md.) 35 Atl. 98.

estate for their face value, but he sold them for less, although the maker was solvent, and ultimately paid the whole face value, it was held that the executor was liable for the face value of the notes and interest in full.<sup>9</sup>

In still other states the executor or administrator is, by statute, commanded to sell the personal estate within a limited time.<sup>10</sup>

As an auxiliary to the power of sale of personal property owned by the executor or administrator, his power is extended to indorsing the bills of exchange or promissory notes of the deceased, with the same effect as if the indorsement had been made by the deceased himself.<sup>11</sup>

The effect of an indorsement by a foreign executor or administrator has been questioned in some cases. The better opinion seems to be that an executor or administrator, duly appointed, and having the note in his possession, may indorse it before maturity, and his indorsement carries the whole title to the note as if indorsed by the deceased in his lifetime, so that the indorsee may sue upon it in his own name in another state.<sup>12</sup> It was held in one or two cases that such an indorsement does not give the indorsee a right to sue in another state, where the indorsing executor or administrator has not taken out letters, because that would give the indorsee a greater right than the indorser had.<sup>13</sup> This reasoning, however, is condemned by Chief Justice Shaw, in *Rand v. Hubbard*,<sup>14</sup> as in many cases one may give a right to sue which he himself has not; for example, an administrator who sells real estate under a license. If the note is overdue, it can be indorsed by an administrator or executor qualified in the state in which suit is brought.<sup>15</sup>

Neither an executor nor administrator can indorse a note before he has been appointed by the probate court, though an indorsement

<sup>9</sup> *In re Glover*, 29 S. W. 982, 127 Mo. 153.

<sup>10</sup> Ohio Rev. St. § 6074; *Kennedy's Estate*, 25 Pittsb. Leg. J. 135. See local statutes for specific provisions as to sales of personal property.

<sup>11</sup> *Rawlinson v. Stone*, 3 Wils. 1; *Watkins v. Maule*, 2 Jac. & W. 237; *Clarke v. Blackington*, 110 Mass. 374, 375.

<sup>12</sup> *Rand v. Hubbard*, 4 Metc. (Mass.) 258, 260.

<sup>13</sup> *Thompson v. Wilson*, 2 N. H. 291; *Stearns v. Burnham*, 5 Greenl. (Me.) 261.

<sup>14</sup> 4 Metc. (Mass.) 259. See, also, ante, p. 152, c. 10.

<sup>15</sup> *Stearns v. Burnham*, 5 Greenl. (Me.) 261.

made before appointment would become valid after the appointment has been duly made.<sup>16</sup>

A mortgage before foreclosure, being considered personal property of the mortgagee, may be sold by his executor or administrator, and assigned by him, without license of the probate court, except as it may be required by statute.<sup>17</sup> After foreclosure, the mortgage interest becomes real property, and cannot be sold without license of court.<sup>18</sup>

An executor's or administrator's power of disposal of the personal property of the testator is said by eminent authority to include the power to mortgage the assets in order to raise money for the purposes of administration, and to insert a power of sale in the mortgage.<sup>19</sup> This is certainly a reasonable rule, and is recognized by statute in many states, where a statutory power is also given to the executor or administrator to mortgage the real estate for purposes of administration.<sup>20</sup> The power of the executor or administrator to sell includes the power to pledge the assets to raise money, and the pledgee may sell if the pledged property is not redeemed.<sup>21</sup>

#### SALES OF REAL ESTATE TO PAY DEBTS.

116. The real estate of the testator or intestate at common law vests in the devisees or heirs, and does not go to the executor or administrator, unless by statutory enactment. In every state, however, a statutory provision exists whereby the real estate of the deceased may be subjected by the executor or administrator to the payment of debts of the deceased. This provision varies in form, being in some states an order of the probate court for the

<sup>16</sup> *Rand v. Hubbard*, 4 Metc. (Mass.) 256. Cf. ante, p. 247, c. 15.

<sup>17</sup> *Burt v. Ricker*, 6 Allen (Mass.) 77; *Crooker v. Jewell*, 31 Me. 313; *Allender v. Riston*, 2 Gill & J. (Md.) 97.

<sup>18</sup> *In re Blair*, 13 Metc. (Mass.) 126; Mass. Pub. St. c. 133, § 9.

<sup>19</sup> *Lord Hardwicke*, *Mead v. Orrery*, 3 Atk. 239; *Scott v. Tyler*, 2 Dickens, 724; *Russell v. Plaice*, 18 Beav. 21; *Allender v. Riston*, 2 Gill & J. (Md.) 97.

<sup>20</sup> *Post*, p. 301.

<sup>21</sup> *Russell v. Plaice*, 18 Beav. 28, 29; *Petrie v. Clark*, 11 Serg. & R. 388.

sale of the real estate on application of the executor or administrator, and in others being a suit in equity to accomplish the same object.

117. The important points to be considered in regard to sales of real estate to pay debts are as follows:

- (a) Who may apply for leave to sell.
- (b) Within what time.
- (c) Form of the application.
- (d) Notice of the application to parties interested.
- (e) Proof requisite for order of sale.
- (f) Order or license.
- (g) Notice of sale.
- (h) Sale and its incidents.
- (i) Purchase money.
- (j) Deed.
- (k) Confirmation of sale.
- (l) Rights of purchasers.
- (m) Validity of sale in collateral actions.

It has already been seen that the main and primary portion of the property which is subject to administration at common law by an executor or administrator is the personal estate. The real estate did not, and does not, unless by statute, go to the executor or administrator at all. It is, however, property of the deceased; and, as such, it has been deemed best in all states to make it liable for the debts of the deceased. It is generally considered a secondary fund, though, by statute, power is sometimes given to the court to reserve a part or all of the personal estate, and pay the debts by a sale of the real estate.<sup>22</sup> Such procedure is highly unusual, however, and would only be adopted in extraordinary circumstances.

*Who may Apply for Leave to Sell.*

The purpose of the sale is the payment of debts, and therefore the creditors have a direct interest in seeing that a sale is made

<sup>22</sup> Waring v. Waring, 2 Bland. (Md.) 673; Moore v. Moore, 14 Barb. (N. Y.) 27, 30.

if the personalty is insufficient to pay their debts; but as the executor or administrator represents their interests in selling the estate, as well as the interests of the legatees and distributees, and as he has the general management of administration, the power to apply for leave to sell the real estate to pay debts is usually given to him alone.<sup>23</sup>

If he refuses to proceed to apply for such leave, application should be made by the creditors to the probate court for his removal.<sup>24</sup> The probate court cannot, in the absence of statutory authority, compel him to take such proceedings,<sup>25</sup> unless the court exercises equitable jurisdiction, in which case it may probably, on proof of the necessity of such action, order him to make such application.

If one of several executors or administrators wrongfully refuses to join in such a petition, it has been held that a court of equity has no power to compel him to act, but the remedy is by application to the probate court to have him removed, or by suit upon his administration bonds.<sup>26</sup> Nor can creditors themselves make the application to the court unless authorized by statute, for the power follows the statutory language; and if it is given by statute only to the executors and administrators, and an administrator who has begun proceedings for a sale of land dies, the creditors cannot have themselves made parties if the succeeding administrator refuses to proceed with the action, but their remedy is by impeaching his administration, and causing his removal.<sup>27</sup>

The power to sell under the statutory authority is, however, not a personal authority, but is one which is official; and, if the executor or administrator to whom the power is granted by the court dies during the execution of his power, the succeeding administrator may proceed to sell under the order, and will give a good title.<sup>28</sup> When the power is given to the executor and administrator by stat-

<sup>23</sup> See statutes of the various states *passim*.

<sup>24</sup> *Southwick v. Morrell*, 121 Mass. 520.

<sup>25</sup> *Southwick v. Morrell*, 121 Mass. 520; *Brittain v. Dickson*, 16 S. E. 326, 111 N. C. 529.

<sup>26</sup> *Southwick v. Morrell*, 121 Mass. 520.

<sup>27</sup> *Brittain v. Dickson*, 16 S. E. 326, 111 N. C. 529; *Dickey v. Dickey* (N. C.) 24 S. E. 715.

<sup>28</sup> *Gress Lumber Co. v. Leitner*, 18 S. E. 62, 91 Ga. 810; *Succession of Massey*, 15 South. 6, 46 La. Ann. 126.

ute, the right to exercise it depends upon the validity of the appointment. If there has been no appointment, or the appointment is void, the person wrongly acting in the office cannot make a valid sale.<sup>29</sup> If the appointment of the administrator or executor who sells the land shows on its face that it is void, then the sale may be attacked collaterally, and may be shown to be void.<sup>30</sup> But the party relying on the sale for his title need not prove the appointment of the administrator in collateral proceedings to attack the sale,<sup>31</sup> nor will mere irregularities in the appointment be sufficient to vitiate the sale.<sup>32</sup>

This power of sale does not exist in favor of an executor and residuary legatee who has given bond to pay debts and legacies. He is, by that bond, obliged to pay all the debts and legacies personally, and cannot rely upon the estate being sufficient for that purpose.<sup>33</sup>

*Within What Time Application shall be Made.*

The limit of time within which application should be made for leave to sell the real estate is in many states fixed by statute. Except so far as it is fixed by statute, the general principle that laches or negligence in asserting a claim will bar the right is the only impediment to making such application arising from the lapse of time. Thus, it has been held that a delay of nine years in making the application would not defeat the right, it being explained by the fact that a pending lawsuit rendered it impossible to decide before that time whether it would be necessary to sell the real estate to pay debts;<sup>34</sup> so a delay of 13 years, when the parties believed the interests of all demanded delay;<sup>35</sup> and of five years when the estate was still in process of settlement.<sup>36</sup> On the other

<sup>29</sup> Pryor v. Downey, 50 Cal. 388, 399; Whitesides v. Barber, 24 S. O. 373, 375; Haug v. Primeau, 57 N. W. 25, 98 Mich. 91.

<sup>30</sup> Haug v. Primeau, 57 N. W. 25, 98 Mich. 91. Cf. ante, p. 19, c. 2.

<sup>31</sup> Evans v. Martin (Tex. Civ. App.) 25 S. W. 688.

<sup>32</sup> Ford's Heirs v. Mills, 14 South. 845, 46 La. Ann. 331. As to the obligations of such a bond, see ante, p. 190, c. 12.

<sup>33</sup> Thayer v. Winchester, 133 Mass. 449.

<sup>34</sup> Moore v. Ellsworth, 51 Ill. 308, 310.

<sup>35</sup> Bursen v. Goodspeed, 60 Ill. 277, 281.

<sup>36</sup> Pratt v. Houghtaling, 8 N. W. 72, 45 Mich. 457, 459.

hand, shorter periods, unexplained, have been held to defeat the right to apply.<sup>37</sup>

### *Form of Application.*

The petition for the sale must set forth such facts and make such averments as are required by the statutes under which the proceeding is had, which are in many states, by statute, the value of personal estate in the petitioner's hands, the amount of charges of administration, the amount of debts so far as known, and, if there is a will, the amount of the legacies. So, under a statute which requires that the petition shall set forth, as nearly as the petitioner can, upon diligent inquiry, ascertain them, the names of all the heirs and devisees of the decedent, a statement that, to the best of the petitioner's knowledge, information, and belief, the decedent's "heirs at law are first cousins," naming them, is sufficient.<sup>38</sup>

If the petition recite that the petitioner duly made and returned to the court "a true inventory and appraisement of all the estate, as will more fully appear by reference to the papers on file in the clerk's office," this will be understood to imply that a valuation of the estate will be found in the appraisement, and will cure an omission of the valuation in the petition.<sup>39</sup> If the petition on which a sale is ordered, instead of setting forth all the facts necessary to give jurisdiction, refers to a former petition for some of them, this is good in a collateral attack.<sup>40</sup> The necessary facts are the existence of debts, and the necessity of selling land to pay them, and, if these facts appear, it is sufficient.<sup>41</sup>

Unless by statutory requirement, it is not necessary to allege the amount of debts or the amount of the personal estate, but it is enough to state that the personal estate is insufficient to pay the debts.<sup>42</sup>

<sup>37</sup> *Wingerter v. Wingerter*, 11 Pac. 853, 71 Cal. 105; *Mays v. Rogers*, 37 Ark. 155, 160; *Hatch v. Kelly*, 63 N. H. 29.

<sup>38</sup> *Greenblatt v. Hermann*, 38 N. E. 966, 144 N. Y. 13.

<sup>39</sup> *Burris v. Kennedy* (Cal.) 38 Pac. 971.

<sup>40</sup> *Bateman v. Reitler*, 36 Pac. 548, 19 Colo. 547. But if not, the court acquires no jurisdiction. In *re Byrne's Estate* (Cal.) 44 Pac. 467.

<sup>41</sup> *Ackerson v. Orchard*, 34 Pac. 1106, 35 Pac. 605, and 7 Wash. 377; *Bateman v. Reitler*, 36 Pac. 548, 19 Colo. 547.

<sup>42</sup> *Cotton v. Holloway*, 12 South. 172, 96 Ala. 544; *McNeill v. McBryde*, 16



*Notice of the Application to Parties Interested.*

The notice of application for leave to sell the estate is an important feature of the proceedings, as it is intended to protect the rights of all parties whose interests may be affected by the sale of the land.<sup>43</sup> The form of notice is of two kinds,—either by personal notice, when the proceedings are in form of a suit in equity; or by a general notice to all interested in the state, when the proceedings are by petition for license to sell. In the former case the question of who are parties entitled to formal notice is important. All persons who have an interest in the land, claiming under the deceased, must be made parties, and have notice, since their interests are directly affected by the sale. Thus, the heirs are necessary parties if there is undivided real estate.<sup>44</sup> But, if all the real estate is covered by the will, the heirs are not necessary parties, but all devisees and the residuary legatees are necessary parties.<sup>45</sup> The wife of a devisee is not so interested as to be entitled to notice;<sup>46</sup> nor is a mortgagee, unless his interest would be affected by the sale.<sup>47</sup> If there are infants, a guardian ad litem should be appointed and made party to the suit to protect their interests; otherwise, they may sue the purchaser for their share of the land,<sup>48</sup> or may avoid the sale upon coming of age.<sup>49</sup> But, where the sale is upon petition and publication of general notice, the fact that infants are not personally notified does not invalidate the sale, if the publication is duly made.<sup>50</sup> Persons claiming ad-

S. E. 841, 112 N. C. 408; *In re Williams' Estate*, 22 N. Y. Supp. 906, 1 Misc. Rep. 35.

<sup>43</sup> *Picard v. Montross* (Miss.) 17 So. 375. A recital in the order of sale that the notice was duly published is prima facie evidence that it was so published. *Zillmer v. Gerichten* (Cal.) 43 Pac. 408.

<sup>44</sup> *Dickens v. Long*, 13 S. E. 841, 109 N. C. 165.

<sup>45</sup> *Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Bauerle*, 33 N. E. 166, 143 Ill. 459.

<sup>46</sup> *Harrington v. Harrington*, 13 Gray (Mass.) 514.

<sup>47</sup> *Iowa Loan & Trust Co. v. Holderbaum*, 52 N. W. 550, 86 Iowa, 1.

<sup>48</sup> *Gardner v. Cheatham*, 16 S. E. 368, 37 S. C. 73; *Rollins v. Brown*, 16 S. E. 44, 37 S. C. 345; *Gay v. City of Louisville*, 20 S. W. 266, 93 Ky. 349; *Thomas v. Parker*, 32 Pac. 562, 97 Cal. 456; *Harrison v. Harrison*, 11 S. E. 356, 106 N. C. 282.

<sup>49</sup> *Coffin v. Cook*, 11 S. E. 371, 106 N. C. 376.

<sup>50</sup> *Thomas v. Parker*, 32 Pac. 562, 97 Cal. 456.

versely to the deceased, as by disseisin, may be made parties,<sup>51</sup> but are not necessary.<sup>52</sup>

If the statutes provide for a general notice to all persons interested in the estate, then it is not necessary that the names of the persons should be inserted in the notice, unless it is required by statute.<sup>53</sup> The statutory provisions as to the mode of publication of this general notice must be strictly followed. If notice is not given as required by statute, the sale is void, and may be shown to be so in collateral proceedings;<sup>54</sup> but this is true only of sales by executors or administrators where they rely only on the license given by the court. If they have any estate in the land, as where they have taken the land on execution for a debt due to the deceased, and then sell it to pay debts, the sale is not void if proper notice is not given, but only voidable by those entitled to the land; and, if they do not choose to avoid it, it is valid as against a stranger.<sup>55</sup>

*Proof Requisite for Order of Sale.*

At the hearing, the main fact necessary to be proved, in addition to showing that this is real estate belonging to the estate, is that the personal assets are insufficient to pay the debts of the estate. This fact includes two subordinate facts: (a) That there are valid debts existing unpaid at the time the application is made; (b) that the amount necessary to pay these debts cannot be realized from the personal assets.

*Same—Valid Debts Unpaid.*

In many cases the decision has turned upon the question whether the debts are valid, enforceable debts against the estate. If there

<sup>51</sup> Doan v. Biteley, 32 N. E. 600, 49 Ohio St. 588.

<sup>52</sup> Vail v. Rinehart, 4 N. E. 218, 105 Ind. 6.

<sup>53</sup> Stack v. Royce, 52 N. W. 675, 34 Neb. 833; Furth v. Trust Co., 42 Pac. 523, 13 Wash. 73.

<sup>54</sup> Cunningham v. Anderson, 17 S. W. 972, 107 Mo. 371; Chicago, K. & N. Ry. Co. v. Cook, 22 Pac. 988, 43 Kan. 83; Wellman v. Lawrence, 15 Mass. 326; Dorrance v. Raynsford, 34 Atl. 706, 67 Conn. 1; Hutchison v. Shelley (Mo.) 34 S. W. 838.

<sup>55</sup> Thomas v. Le Baron, 10 Metc. (Mass.) 407; Verry v. McClellan, 6 Gray (Mass.) 535. But see Hellman v. Merz (Cal.) 44 Pac. 1079. Cf., as to land taken on execution, ante, p. 209, c. 14.

are no debts existing which are enforceable against the estate, the court has no power to make the order; for example, if the debts are barred by the special statute of limitations,<sup>56</sup> or by failure to have them registered or filed or presented for payment, as required by statute.<sup>57</sup>

Thus, in some states, if the administrator or executor duly posts notifications of his appointment, and the debts against the estate are not enforced by suit within a limited time from that time if the estate is solvent, or by proof before the commissioners of insolvency if the estate is insolvent, they become barred by the statute of limitations applicable to executors, and they then furnish no ground for a license to sell real estate,<sup>58</sup> and the real estate cannot be used as assets of the estate.<sup>59</sup> If, however, debts have been duly proved before commissioners in insolvency, they are not affected by the special statute of limitations, and land may be sold to pay them;<sup>60</sup> or, if suit has been begun within the limited time, the fact that it is not ended till after the expiration of that time does not defeat the right to the license.<sup>61</sup> If the only debt against the estate is that of the administrator, he may, by lapse of time, before he applies for leave to sell the real estate, and by allowing the heirs to divide up or sell the real estate, under the belief that it will not be wanted to pay debts, estop himself, after the lapse of the statutory period, from claiming the benefit of a sale of land to pay his debt; but, if there is no such equity, it has been said that the mere lapse of time does not prevent him from petitioning for such a sale, at least before his administration account is settled.<sup>62</sup> If the executor or administrator pays with his own money the debts of the testator beyond the amount of the personal assets before he can legally pay debts, he

<sup>56</sup> *Tarbell v. Parker*, 106 Mass. 349. As to statute of limitation, see post, p. 527, c. 24.

<sup>57</sup> *Nagle v. Ball*, 13 South. 929, 71 Miss. 330. Cf. ante, p. 336, c. 17.

<sup>58</sup> *Aiken v. Morse*, 104 Mass. 277; *Tarbell v. Parker*, 106 Mass. 347; *Palmer v. Palmer*, 13 Gray (Mass.) 328; *Slocum v. English*, 62 N. Y. 494. Cf. post, p. 530, c. 24.

<sup>59</sup> *Hudson v. Hulbert*, 15 Pick. (Mass.) 425.

<sup>60</sup> *Edmunds v. Rockwell*, 125 Mass. 363.

<sup>61</sup> *Hudson v. Hulbert*, 15 Pick. (Mass.) 423.

<sup>62</sup> *Palmer v. Palmer*, 13 Gray (Mass.) 326. Cf. ante, p. 242, c. 14; post, p. 527, c. 24.

cannot thereafter obtain a license to sell the real estate for his reimbursement, unless the estate remains at the time of the application as it was at the death of the testator, without partition among the heirs or devisees, and without any conveyance from them or the executor; nor unless he makes an application within a reasonable time after his payment of debts.<sup>63</sup> The money received from the sale of land is not new assets, which renew a claim by a creditor which has been barred by the statute of limitations.<sup>64</sup>

The question of the existence of debts is in some states held to be open in a collateral suit, in the absence of contrary statutory provisions.<sup>65</sup> If there are no debts, the sale is void, and therefore the administrator is not liable to an administrator de bonis non for the proceeds of the sale.<sup>66</sup> The mere fact that the record of proceedings for a sale does not recite debts is no proof that there are none.<sup>67</sup> If the sale is ordered in anticipation of claims which the widow may have on the estate, but which never materialize, the sale is void.<sup>68</sup>

But if there are any valid debts, for instance, the expenses of settling the estate, and there is not personal estate sufficient to pay them, it will be enough to sustain the jurisdiction.<sup>69</sup> So, of taxes levied against the decedent, and unpaid.<sup>70</sup> The rules as to the payment of taxes are discussed in a later chapter.<sup>71</sup> And by statute in some states it is provided that, when a license for sale or mortgage of real estate to pay debts and charges of a deceased person is granted

<sup>63</sup> *Ex parte Allen*, 15 Mass. 58.

<sup>64</sup> *Chenery v. Webster*, 8 Allen (Mass.) 76. Cf. post, p. 527, c. 24.

<sup>65</sup> *Aiken v. Morse*, 104 Mass. 277; *Lamson v. Schutt*, 4 Allen (Mass.) 359; *Heath v. Wells*, 5 Pick. (Mass.) 139; *Shelton v. Hadlock*, 25 Atl. 483, 62 Conn. 143.

<sup>66</sup> *Woods v. Legg*, 8 South. 342, 91 Ala. 511. But, as to contradicting recitals of debts in the probate records, see ante, p. 19, c. 2.

<sup>67</sup> *Harris v. Shafer* (Tex. Civ. App.) 21 S. W. 110. But, if it does recite debts, the better opinion would seem to be that the recital is conclusive. Cf. ante, p. 19, c. 2.

<sup>68</sup> *Kremer v. Bull* (Ky.) 26 S. W. 1099.

<sup>69</sup> *Personette v. Johnson*, 40 N. J. Eq. 173; *Stevens v. Burgess*, 61 Me. 89; *Griffith v. Bank*, 6 Gill & J. (Md.) 424; *Falley v. Gribbling*, 26 N. E. 794, 128 Ind. 110; *Needham v. Salt Lake City*, 26 Pac. 920, 7 Utah, 319.

<sup>70</sup> *Sales v. Cosgrove* (Ky.) 25 S. W. 594. Cf. ante, p. 273, c. 15, as to taxation, and post, p. 323, c. 17, as to payment of taxes.

<sup>71</sup> Post, p. 323, c. 17.

by a probate court, the adjudication of the court as to the existence of the debts and charges is final so far as the same may affect any title acquired by virtue of the license, but it does not affect the right of the executor or administrator to contest the validity of the debts and charges.<sup>72</sup>

*Same—Personal Estate Insolvent.*

The proof must also show that the amount which can be realized from the sale of personal assets is not sufficient to pay the existing debts. This proof may be made by any relevant evidence. The executor or administrator must show all the personal assets, and if he conceal part, as, for instance, his own note payable to the estate, and thus reduces the available assets, so that there is a deficiency, this is unfaithful administration, and will render him liable on his bond.<sup>73</sup> Questions of some difficulty have arisen as to whether, if the personal assets were originally sufficient to pay the debts of the estate, but have been wasted by an executor or administrator, his successor in office, as administrator de bonis non, can have an order for the sale of real estate, or should look to recovery from the original executor or administrator. Much depends in such cases upon the wording of the statutes. Under statutes which provide that the real estate can be sold only when all the personal estate which "could have been applied to the payment of debts is insufficient," it is held that if the personal assets were originally sufficient to pay the debts, but have been wasted by the executor or administrator, the land cannot be sold under the statutes, and that a petition by his successor to sell the land to pay debts would be enjoined upon application of the heirs or persons claiming under them.<sup>74</sup> And this is probably the better opinion in cases where a valid action against the original executor or administrator exists, although in one case it has been held that the administrator de bonis non need not make any allegation as to the status of the property before he took possession, but need only allege that such portion as came into his possession is insufficient

<sup>72</sup> Mass. Pub. St. c. 142, § 20. Cf. ante, p. 19, c. 2.

<sup>73</sup> Chapin v. Waters, 110 Mass. 197. Cf. post, p. 431, c. 21.

<sup>74</sup> Kingsland v. Murray, 30 N. E. 845, 133 N. Y. 170; Rowland v. Swope, 39 Ill. App. 514; Banks v. Speers, 16 South. 25, 103 Ala. 436; Anderson v. Northrop, 12 South. 318, 30 Fla. 612.

to pay existing debts.<sup>75</sup> But if the administrator *de bonis non* shows insolvency of the preceding executor or administrator, and that his bond is uncollectible, probably the land might be sold.

If the personal assets are sufficient to pay the debts, the land cannot be sold.<sup>76</sup> If the statute requires the insufficiency of personal assets to be proved by "witnesses," one witness is enough.<sup>77</sup> If there are administrators in two jurisdictions, each must settle the question of sufficiency of personal assets by the amount of the personal property in the possession of its administrator.<sup>78</sup> But, if there is but one administration, probably the question of sufficiency of personal assets would include such assets in all jurisdictions so far as they had come into the possession of the executor or administrator.

If conflicting titles will render it probable that the land will sell for much less than it is worth, the probate court will, by appropriate proceedings, settle the title so far as it can before ordering the sale.<sup>79</sup> And the court may even refuse the license or order, in its discretion. Thus, in one case the court refused to grant a license to an administratrix to sell the real estate of her intestate for the payment of his debts, it appearing that the only debt due from the estate of the intestate was secured by a mortgage; that the mortgagee had obtained possession of the mortgaged premises; that he had never demanded the debt; that more than four years had elapsed since the granting the administration; and that the heirs offered to save her harmless from all damages and costs by reason of such debt, and although such mortgaged premises had been assigned to the administratrix as her dower in the estate of the intestate.<sup>80</sup> So, the court may, in its discretion, order any specific part of the land to be sold.<sup>81</sup>

<sup>75</sup> *Beniteau v. Dodsley*, 50 N. W. 110, 88 Mich. 152.

<sup>76</sup> *Banks v. Speers*, 16 South. 25, 103 Ala. 436.

<sup>77</sup> *Thompson v. Boswell*, 12 South. 809, 97 Ala. 570; *Garner v. Toney* (Ala.) 18 South. 161.

<sup>78</sup> *Young v. Wittenmyre*, 22 Ill. App. 496. Cf. ante, p. 163, c. 10.

<sup>79</sup> *Sprague v. West*, 127 Mass. 472; *Ex parte Allen*, 15 Mass. 58.

<sup>80</sup> *Scott v. Hancock*, 13 Mass. 162.

<sup>81</sup> *Hays v. Jackson*, 6 Mass. 149.

*Order or License.*

The order or decree of sale should follow carefully the requirements of the statute, and empowers the executor or administrator to sell the land upon giving notice as required by statute. The order or decree must describe the land which is to be sold. An order for the sale of land which does not describe the land to be sold is void;<sup>82</sup> or one which gives an impossible description, as where it says that the land is located in a certain township and county, and in fact there is no such township in the county;<sup>83</sup> or if the description is so uncertain that it cannot be identified.<sup>84</sup> But, if the land can be identified from the description, the mere failure to add another distinguishing feature to the description will not invalidate it.<sup>85</sup> An order of sale which recites that application has been made for leave to sell the land is sufficient proof thereof in a collateral proceeding, though the application cannot be found in the probate records.<sup>86</sup>

The statutes which give the right to sell generally provide that the sale shall be at public auction, as this mode of sale is supposed to protect better the rights of all parties. If this mode of sale alone is required by the statutes, the court cannot license a private sale.<sup>87</sup>

The real estate which may be ordered to be sold includes all which the deceased owned at the time of his death, and which is answerable for his debts. It also includes all that has been conveyed by the deceased in fraud of his creditors;<sup>88</sup> also land deeded away as a gift, if the donor at that time was incapacitated to pay his debts by that gift.<sup>89</sup> But it includes only such land as equitably belongs to the estate. So, if the deceased had contracted to sell

<sup>82</sup> *Melton v. Fitch*, 28 S. W. 612, 125 Mo. 281.

<sup>83</sup> *Hazelton v. Bogardus*, 35 Pac. 602, 8 Wash. 102.

<sup>84</sup> *Harris v. Shafer*, 23 S. W. 979, 86 Tex. 314. But, if the land can be identified by references in the decree to other documents, this is sufficient. *Ferguson v. Templeton* (Tex. Civ. App.) 32 S. W. 148.

<sup>85</sup> *Hamilton v. Railway Co.*, 52 N. W. 1079, 51 Minn. 97.

<sup>86</sup> *Perry v. Blakey*, 23 S. W. 804, 5 Tex. Civ. App. 331.

<sup>87</sup> *Jacoby v. McMahon*, 25 Pittsb. Leg. J. (N. S.) 446. Cf., as to jurisdiction generally, ante, p. 15, c. 2.

<sup>88</sup> *Wescott v. McDonald*, 22 Me. 402.

<sup>89</sup> *Norton v. Norton*, 5 Cush. (Mass.) 528. Cf. ante, p. 234, c. 14.

lands, and after his death the executor has been ordered by decree of court to make a deed of the same, the interest of the deceased's estate in the land is ended, and a petition for license to sell the real estate will not be sustained.<sup>90</sup> In any event, the sale is only of the interest of the deceased in the land, whatever that may be.<sup>91</sup>

### *Notice of Sale.*

Like all other steps in the proceedings, the notice should follow the statutory provisions with precision. The notice is generally a copy, or substantially so, of the order of sale, and gives the time and place of sale, and describes the land to be sold. The publication must follow precisely the requirements of the statute. If the statute requires the notice to be published in such "newspaper" as the court may direct, a weekly newspaper is within the statutory phrase.<sup>92</sup> If the statute requires notice to be printed four weeks successively, once a week next preceding the time appointed for the sale, a sale on the 10th of the month is void, when the last publication was on the 2d.<sup>93</sup> But the sale may be adjourned from time to time if necessary in order to get purchasers.<sup>94</sup> In giving notice of the sale, the fact that the numbers of the houses on the street are wrongly given does not invalidate the sale, if the rest of the description identifies the land fully.<sup>95</sup> And, if the sale is adjourned, the adjournment need not be made by the executor or administrator personally, but may be made by any one authorized by him.<sup>96</sup>

### *Sale and Its Incidents.*

The sale must be conducted in all respects in accordance with the statutory requirements and the order of the court. If the sale is by statute required to be made while the probate court is in session, and the probate court has also a common-law side as a court of common pleas, yet a sale made while the probate side is

<sup>90</sup> Caverly v. Eastman, 7 N. E. 33, 142 Mass. 4.

<sup>91</sup> Hasty v. Johnson, 3 Me. 282. And, if the supposed deceased is alive, all the proceedings are void. Schleicher v. Gutbrod (Tex. Civ. App.) 34 S. W. 657.

<sup>92</sup> In re O'Sullivan, 24 Pac. 281, 84 Cal. 444.

<sup>93</sup> Tappan v. Dayton, 28 Atl. 1, 51 N. J. Eq. 260.

<sup>94</sup> Noland v. Barrett, 26 S. W. 692, 122 Mo. 181.

<sup>95</sup> New England Hospital v. Sohler, 115 Mass. 50.

<sup>96</sup> Hicks v. Willis, 7 Atl. 507, 41 N. J. Eq. 517.



in session is valid.<sup>97</sup> If a sale at public auction is the only kind authorized by statute, a private sale is invalid, as was before said.<sup>98</sup>

The real estate may be sold subject to a mortgage, or a life estate or lease, if these incumbrances exist upon it.<sup>99</sup> If there is a lease, the rents after sale are payable to the purchaser, who becomes the landlord.<sup>100</sup> In some states it is held that, when mortgaged land is sold, the executor or administrator is only chargeable with the value of the equity of redemption, and should not enter the whole value of land in his accounts, and then offset a charge for paying the mortgage, since that would have the appearance of giving the mortgagee a preference in the payment of a debt; whereas, in truth, the equity alone is assets, and there has been no preference.<sup>101</sup> But in others, as, for example, in Ohio, it is held that the estate should be sold free from liens, which will be discharged by the court out of the proceeds of the sale.<sup>102</sup> And in Massachusetts it is held that an executor or administrator may maintain a bill in equity to discharge the mortgage before selling the land, which is then sold clear of incumbrances.<sup>103</sup> Any taxes which are due on the land at the time of the sale should be charged against the rents of the land previous to the sale, and the proceeds of the sale left unincumbered.<sup>104</sup> The statute providing for the sale of land to pay debts does not change the title to the land before the sale. It still remains in the heirs or devisees until actually sold, and until that time they are entitled to the rents and profits.<sup>105</sup> And, for that reason, an executor who is served with a trustee writ, in a suit against a devisee, before he has petitioned for leave to

<sup>97</sup> *Macey v. Stark*, 21 S. W. 1088, 116 Mo. 481.

<sup>98</sup> *Ante*, note 87. But cf. *Burris v. Kennedy*, 41 Pac. 458, 108 Cal. 331.

<sup>99</sup> *Kenley v. Bryan*, 110 Ill. 652. Cf. *ante*, note 91. Or a dower interest. *Ottinger v. Specht* (Ill. Sup.) 44 N. E. 399.

<sup>100</sup> *Foote v. Overman*, 22 Ill. App. 181.

<sup>101</sup> *Abby v. Fuller*, 8 Metc. (Mass.) 39. As to priority of mortgage liens, see *post*, p. 326, c. 17.

<sup>102</sup> *Stone v. Strong*, 42 Ohio St. 53; *Schmitt v. Willis*, 4 Atl. 767, 40 N. J. Eq. 515.

<sup>103</sup> *Mason v. Daly*, 117 Mass. 406.

<sup>104</sup> *Fessenden's Appeal*, 77 Me. 98.

<sup>105</sup> *Gibson v. Farley*, 16 Mass. 280; *Symmes v. Drew*, 21 Pick. (Mass.) 280, 282. Cf. *ante*, p. 207, c. 14.

sell the real estate to pay debts, is not bound by that writ to retain the proceeds of the sale.<sup>106</sup> And, after the sale, the administrator or executor holds the proceeds in *autre droit*; so that, if he deposits them with a third person, that person cannot be held as trustee of the administrator in a suit against him on his own private debts.<sup>107</sup> After the real estate is sold, interest on the proceeds are assets, and the executor or administrator is chargeable with them.<sup>108</sup> If the sale is made after an appeal is duly taken from the decree ordering the sale, by the parties owning the real estate, the sale is void, as the appeal suspends the validity of the decree.<sup>109</sup>

### *Purchase Money.*

Ordinarily, the sale should be for cash, as the purpose is to secure money to pay off the debts of the estate, but in many states credit is allowed to be given. The statutes must be complied with in any event, and a departure from them will render the executor or administrator liable.<sup>110</sup> If the purchaser fails to pay, the administrator can put the land up for sale again, and can recover of the first purchaser the difference between the first price and what the land sells for at the second sale, although the second price is enough to pay the debts and legacies;<sup>111</sup> and it is held that he may also bring suit for the purchase money on the first sale in his own name, and not in his capacity as executor, since the contract of sale is with him personally.<sup>112</sup> If the purchaser is a creditor of the estate, he cannot retain the price to offset his claim, for the estate may be insolvent, in which case his claim would be reduced.<sup>113</sup> Though, if it is shown that no possible injustice can

<sup>106</sup> Capen v. Duggan, 136 Mass. 501. Cf. post, p. 495, c. 23.

<sup>107</sup> Marvel v. Babbitt, 9 N. E. 566, 143 Mass. 227. Cf. post, p. 495, c. 23.

<sup>108</sup> Grout v. Hapgood, 13 Pick. (Mass.) 159; Jennison v. Hapgood, 14 Pick. (Mass.) 345; Newcomb v. Stebbins, 9 Metc. (Mass.) 545. Cf. ante, p. 269, c. 15.

<sup>109</sup> Francis v. Daley, 23 N. E. 218, 150 Mass. 381.

<sup>110</sup> Post, p. 300.

<sup>111</sup> Cobb v. Wood, 8 Cush. (Mass.) 228; Thompson v. Whitmarsh, 2 N. E. 273, 100 N. Y. 35; Sproull v. Seay, 76 Ga. 27.

<sup>112</sup> Thompson v. Whitmarsh, 2 N. E. 273, 100 N. Y. 35. Cf. ante, p. 253, c. 15.

<sup>113</sup> Schwallenberg v. Jennings, 43 Md. 554, 559; Brandon v. Allison, 66 N. C. 532. Cf. post, p. 342, c. 17.

be done by the retainer, it may be allowed.<sup>114</sup> The mere fact that the price paid by the purchaser is small does not invalidate his title, in the absence of fraud.<sup>115</sup>

The ordinary administration bond does not cover the due administration of the proceeds of real estate sold to pay debts,<sup>116</sup> unless the due administration of these proceeds is made a part of the condition of the bond, as it often is, in which case no further bond need be given;<sup>117</sup> but the ordinary bond does not cover a neglect of the administrator or executor to apply for a license to sell real estate, when requested so to do in a proper case by a creditor.<sup>118</sup> If, however, the administrator is licensed to sell more real estate than is enough to pay debts, he gives a special bond covering the disposition of the surplus.<sup>119</sup> If such a bond is given as is provided for by the statute to prevent the sale of the land,<sup>120</sup> there is no breach of it, unless some debt is charged on the creditor's probate account, and allowed by the judge, and there are not assets enough to pay it. A judgment against the administrator is not enough.<sup>121</sup>

### *Deed.*

The deed should recite the order of the court which authorizes the sale, the notice and publication thereof, the manner, time, place, and price of sale, and any other requirements which the statutes may prescribe as a part of the proceedings, such as appraisement of the land, etc. These recitals, however, are not essential to the validity of the deed, but the purchaser is entitled to have them put in the deed, so that evidence of the compliance with all require-

<sup>114</sup> *Claridge v. Lavenburg*, 26 S. W. 324, 7 Tex. Civ. App. 155.

<sup>115</sup> *Williams v. Johnson*, 17 S. E. 496, 112 N. C. 424.

<sup>116</sup> *In re Winona Bridge Ry. Co.*, 52 N. W. 1079, 51 Minn. 97. Cf. ante, p. 190, c. 12.

<sup>117</sup> Mass. Pub. St. c. 143, § 4; *Hasty v. Johnson*, 3 Me. 282. See ante, p. 190, c. 12.

<sup>118</sup> *Newcomb v. Wing*, 3 Pick. (Mass.) 168.

<sup>119</sup> *Fay v. Valentine*, 8 Pick. (Mass.) 526; *Tenney v. Poor*, 14 Gray (Mass.) 502. The title passed by the sale is not invalidated by irregularity in the bond. *Burris v. Kennedy*, 41 Pac. 458, 108 Cal. 331.

<sup>120</sup> Ante, p. 186, c. 12.

<sup>121</sup> *Studley v. Josselyn*, 5 Allen (Mass.) 118.

ments may be on record.<sup>122</sup> The description of the land sold should also follow the description of land ordered to be sold, for, if the sale is of land other than that which is ordered to be sold, the sale is void.<sup>123</sup>

As to the effect of covenants in such a deed upon the executor or administrator personally, it depends upon the wording of the deed. If the wording is such as to show that the executor or administrator intended to bind himself only in his representative capacity, then his covenants will have that effect.

Thus, where the administrators of an insolvent estate, under a license of court to sell the real estate of their intestate for payment of debts, sold an equity of redemption of which their intestate was supposed to have died seised (the grantees at the same time purchasing an assignment of the mortgage), and in their deed the administrators covenanted in their capacity of administrators that they, as administrators, were lawfully seised, free from incumbrances except the mortgage, that they had in their said capacity good right to sell, etc., and that as administrators they would warrant and defend against the lawful claims of all persons, and signed and sealed as administrators, in an action on covenant to warrant, after ejection by paramount title, it was held that they were not answerable personally for damages, but had bound themselves only in their representative capacity.<sup>124</sup>

In another case, in a conveyance by administrators of sundry parcels of land, there was an exception from the operation of their covenant of warranty of all mortgages made by the intestate in his lifetime, and recorded. There were three prior mortgages, and one unconditional conveyance of part of the land, all recorded. There was also an unrecorded bond of defeasance relating to the land conveyed by the unconditional deed. The grantee in this last deed having evicted the purchaser from the administrators, who summoned them to defend his title, the latter brought action against them for breach of covenant of warranty. The defendants were allowed to prove plaintiff's knowledge of this bond of defea-

<sup>122</sup> *Thomas v. Le Baron*, 8 Metc. (Mass.) 355, 361; *Stryker v. Vanderbilt*, 27 N. J. Law, 68, 71.

<sup>123</sup> See ante, p. 291.

<sup>124</sup> *Sumner v. Williams*, 8 Mass. 162. Cf. ante, p. 259, c. 15.

sance before he bought the land, and it was held that the deed and bond together constituted a mortgage, and plaintiff failed to recover.<sup>125</sup>

### *Confirmation of Sale.*

In many states the executor or administrator is bound by statute to report the sale, its manner, price, etc., to the probate court, and have the same passed upon by the court, and either confirmed or rejected. In such states, it is provided by statute that the sale is void, unless it is duly confirmed by the court, and will pass no title to the purchaser.<sup>126</sup> In states where such confirmation is not required by statute, the title passes by the deed without further action by the probate court.

### *Rights of Purchasers.*

In case of sales of real or personal estate by executors or administrators, the property sold passes beyond the reach of creditors, and the purchasers are not generally bound to see that the purchase money is applied properly to the purposes of the estate, even if they know that the property belongs to the estate, and is not the property of the executor or administrator in his own right.<sup>127</sup> But if the purchaser knows, or ought from the circumstances to suspect, that the executor or administrator is wrongfully using the proceeds of the sale, the purchaser may be held liable for the property purchased, either by the court annulling the sale, and ordering a reconveyance, or holding him responsible for the value;<sup>128</sup> and the fact that the executor applies the proceeds in payment of debts of his own to the purchaser is a circumstance sufficient to affect the purchaser with knowledge.<sup>129</sup> Any fraud or collusion between

<sup>125</sup> *Foster v. Woods*, 16 Mass. 116.

<sup>126</sup> *Henry v. McKerlie*, 78 Mo. 416, 428; *Mitchell v. Bliss*, 47 Mo. 353; *Emerick's Estate*, 33 Atl. 550, 172 Pa. St. 191.

<sup>127</sup> *Hutchins v. State Bank*, 12 Metc. (Mass.) 423; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 155; *Rayner v. Pearsall*, 3 Johns. Ch. (N. Y.) 578; *Brockenbrough v. Turner*, 78 Va. 438; *Allender v. Riston*, 2 Gill & J. (Md.) 97.

<sup>128</sup> *Elliot v. Merryman*, 1 White & T. Lead. Cas. Eq. 89; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; *Petrie v. Clark*, 11 Serg. & R. (Pa.) 377.

<sup>129</sup> *Petrie v. Clark*, 11 Serg. & R. (Pa.) 377; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; *Brockenbrough v. Turner*, 78 Va. 438; *Allender v. Riston*, 2 Gill & J. (Md.) 98.

the executor and the purchaser vitiates the sale, and renders the purchaser liable for the assets sold or their value;<sup>130</sup> as, for instance, if the executor or administrator agrees with the intending purchaser to sell the land to him for a fixed price, in consideration of some benefit to the administrator.<sup>131</sup>

An executor or administrator can in no instance purchase the assets himself, whether he does it directly or under cover of other parties as nominal purchasers;<sup>132</sup> and, if he does so purchase, he is held as trustee for those entitled to the estate, and is held to a very strict liability of accounting, particularly in regard to interest;<sup>133</sup> or the sale may be avoided,<sup>134</sup> and the estate may be put up for sale again, and, if it brings a less price than that paid by the executor or his agent, their sale will be confirmed, but, if it brings more, their sale will be set aside.<sup>135</sup> If the wife of an executor or administrator wish to bid it in, she may do so in states in which a married woman is allowed to hold property separate from her husband's.<sup>136</sup>

A sale by an executor or administrator, however, whether made to himself or fraudulently to another,<sup>137</sup> is not ipso facto void, nor voidable by a stranger, but is voidable by those interested in

<sup>130</sup> *Whale v. Booth*, 4 Term R. 625, note; *Scott v. Tyler*, 2 Dickens, 725; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 31; *Somes v. Skinner*, 16 Mass. 348; *Somes v. Brewer*, 2 Pick. (Mass.) 191; *Harrington v. Brown*, 5 Pick. (Mass.) 521; *Yeackel v. Litchfield*, 13 Allen (Mass.) 420; *Petrie v. Clark*, 11 Serg. & R. (Pa.) 388; *Oberlin College v. Fowler*, 10 Allen (Mass.) 545.

<sup>131</sup> *Hunt v. Frost*, 4 Cush. (Mass.) 54.

<sup>132</sup> *Davis v. Hughes*, 11 S. E. 488, 86 Va. 909.

<sup>133</sup> *Bechtold v. Read* (N. J. Ch.) 28 Atl. 264; *Watson v. Toone*, 6 Madd. 153; *Bland v. Fleeman*, 23 S. W. 4, 58 Ark. 84; *Clark v. Blackington*, 110 Mass. 375, 376; *Brooks v. Whitney*, 11 Metc. (Mass.) 420; *Oberlin College v. Fowler*, 10 Allen (Mass.) 545; *Wipff v. Heder*, 26 S. W. 118, 6 Tex. Civ. App. 685; *Conway v. Green*, 1 Har. & J. (Md.) 151; *Etheredge v. Slayton*, 19 S. E. 818, 94 Ga. 496.

<sup>134</sup> *Tayloe v. Tayloe*, 12 S. E. 836, 108 N. C. 69; *Myer's Estate*, 9 Pa. Co. Ct. R. 439; *Ridgeway v. Ridgeway*, 10 S. E. 495, 84 Ga. 25. Or the purchase money may be regarded as a lien on the land. *Bogart v. Bell* (Ala.) 20 South. 511; *Markle's Estate*, 5 Pa. Dist. R. 348.

<sup>135</sup> *Burnett v. Eaton*, 29 N. J. Eq. 477.

<sup>136</sup> *Crawford v. Gray*, 30 N. E. 885, 131 Ind. 53.

<sup>137</sup> *Lagger v. Association*, 33 N. E. 946, 146 Ill. 283; *Comegys v. Emerick*, 33 N. E. 899, 134 Ind. 148.

the estate, if they assert their right in a reasonable time,<sup>138</sup> and upon refunding the purchase money and otherwise doing equity between the parties.<sup>139</sup> But if the party interested receives his share of the proceeds, executes a full release, and does nothing for 13 years to avoid the sale, it is then too late.<sup>140</sup> If they bring a suit to compel reconveyance, and then, in an amended bill, omit the prayer for reconveyance, this will affirm the sale.<sup>141</sup> But in New York, by statute, such sale is void.<sup>142</sup> If the sale is found by the court to have been bona fide absolutely to the purchaser, and then by him sold to the administrator, the sale is good.<sup>143</sup> If the property so sold is again sold by the purchaser, and conveyed to a bona fide purchaser for full value, having no notice of the fraud, the sale is valid against the heirs.<sup>144</sup> But if the purchaser knew that the land was bought by the executor or administrator, or had reasonable cause to suspect it, he cannot hold the land.<sup>145</sup> The practice of holding a purchaser at a fraudulent sale, who is cognizant of the fraud, a trustee for those entitled to the property, is of equitable origin; and it has been held that a court of law has no right to set aside such a sale except upon proof of actual fraud, and that the mere purchase by the executor or administrator, whether by himself or by another, is not proof of such fraud;<sup>146</sup> but probably courts of all kinds would now enforce the equitable rule. The rule extends to sales not instituted directly by the executor or

<sup>138</sup> *Candler v. Clarke*, 16 S. E. 645, 90 Ga. 550; *Rudolph v. Underwood*, 16 S. E. 55, 88 Ga. 664. Even though a statute declares it "void." *Melms v. Brewing Co.* (Wis.) 66 N. W. 518.

<sup>139</sup> *Yeackel v. Litchfield*, 13 Allen (Mass.) 419; *Fisher v. Bush*, 32 N. E. 924, 133 Ind. 315; *Ives v. Ashley*, 97 Mass. 198; *Lewis v. Welch*, 48 N. W. 608, 49 N. W. 665, and 47 Minn. 193; *Williams v. Marshall*, 4 Gill & J. (Md.) 376.

<sup>140</sup> *Geyer v. Snyder*, 23 N. Y. Supp. 200, 69 Hun, 115.

<sup>141</sup> *Smith v. Worthington*, 4 C. C. A. 130, 53 Fed. 977.

<sup>142</sup> *Forbes v. Halsey*, 26 N. Y. 53.

<sup>143</sup> *Turner v. Shuffler*, 13 S. E. 243, 108 N. C. 642.

<sup>144</sup> *Blood v. Hayman*, 13 Metc. (Mass.) 231; *Robbins v. Bates*, 4 Cush. (Mass.) 104.

<sup>145</sup> *Fisher v. Bush*, 32 N. E. 924, 133 Ind. 315. And a reconveyance may be ordered. *O'Connor v. Mahoney* (Ill. Sup.) 42 N. E. 378.

<sup>146</sup> *Yeackel v. Litchfield*, 13 Allen (Mass.) 419.

administrator, but by operation of law; as, for instance, if judgment is obtained against the estate, and the land is taken on execution and sold, the executor should not buy the land, and, if he does, he gets a title defeasible by those interested in the estate, whether as creditors or distributees.<sup>147</sup>

It has been held in a somewhat recent case that a corporation which makes upon its books a transfer of its stock from an executor to a third person, and issues a certificate of stock to that third person, is not liable, although the transfer is fraudulent as to the persons interested in the estate.<sup>148</sup> This case seems to go on the general ground that one who deals with the executor or administrator is not required to inquire into the fairness of the executor's or administrator's proceedings, unless he actually knows, or in reason ought to know, that a fraud is being perpetrated upon the estate.<sup>149</sup>

*Validity of Sale in Collateral Attack.*

The earlier decisions were inclined to construe very strictly the statutory power of sale, and to hold the executor or administrator to a close pursuance of the statutory requirements; otherwise, the sale was invalid and void, and the title to the land could be attacked in a collateral suit, and shown to be bad. The cases on this point have been cited at some length in a previous portion of this work, to which the reader is referred.<sup>150</sup>

The tendency of modern decisions, however (and in some states statutes have been enacted to this effect), is to uphold the title as against all except those interested in the estate of the deceased, if the license was granted by a court of competent jurisdiction, and upon proper notice to interested parties, and the sale took place in accordance with the license, and the land is bought and held by a bona fide purchaser;<sup>151</sup> and every presumption that is not inconsistent with the record will be made in favor of the validity of the

<sup>147</sup> Marshall v. Carson, 38 N. J. Eq. 258. .

<sup>148</sup> Crocker v. Railroad Co., 137 Mass. 417.

<sup>149</sup> Hutchins v. Bank, 12 Metc. (Mass.) 425

<sup>150</sup> Ante, p. 19, c. 2.

<sup>151</sup> Ante, p. 19, c. 2; Purrington v. Dunning, 11 Me. 174; Ackerson v. Orchard, 34 Pac. 1106, 7 Wash. 377; Gregson v. Tuson, 26 N. E. 874, 153 Mass. 325.



sale.<sup>152</sup> If the record shows all necessary jurisdictional facts, it is *prima facie* valid.<sup>153</sup> Mere irregularity in the proceedings will not avoid the sale and invalidate the title; but a jurisdictional departure from the statute—as, e. g., if the supposed deceased is in fact alive—will have that effect.<sup>154</sup> Therefore, as the statute which authorizes courts to grant licenses to executors and administrators to sell the lands of the deceased for payment of debts gives no authority to appoint a stranger to execute that duty, a sale by such licensee conveys no title to the purchaser.<sup>155</sup> So, where such sale was advertised to be on Friday, the 17th, whereas Friday was in fact the 16th, the sale was for that cause void, although in the last publication, which was on the day of the sale, the error was corrected;<sup>156</sup> so where the deed is not executed within the time allowed by the license or statute;<sup>157</sup> but not so when it is delivered within the time, but not acknowledged till afterwards.<sup>158</sup> So, when the statute provides that the license shall be granted to the executors or administrators, the license must be granted to all the executors or administrators, unless otherwise specially allowed by statute; and a license to one upon his sole petition is void, and may be shown to be so in a collateral proceeding.<sup>159</sup>

### SAME—POWER TO MORTGAGE.

**118. Power to mortgage real estate to raise money to pay debts is given an executor or administrator in many states by statute. A power of sale in a will may confer power to mortgage.**

<sup>152</sup> *Clark v. Hillis*, 34 N. E. 13, 134 Ind. 421; *Bray v. Adams*, 21 S. W. 853, 114 Mo. 486; *Agan v. Shannon*, 15 S. W. 757, 103 Mo. 661. Cf. ante, p. 32, c. 2.

<sup>153</sup> *Shelton v. Hadlock*, 25 Atl. 483, 62 Conn. 143. Cf. ante, p. 32, c. 2.

<sup>154</sup> *Schleicher v. Gutbrod* (Tex. Civ. App.) 34 S. W. 657; *Stilwell v. Swarthout*, 81 N. Y. 113; *Campbell v. Knights*, 26 Me. 224.

<sup>155</sup> *Crouch v. Eveleth*, 12 Mass. 503.

<sup>156</sup> *Wellman v. Lawrence*, 15 Mass. 326; *Stilwell v. Swarthout*, 81 N. Y. 113.

<sup>157</sup> *Macy v. Raymond*, 9 Pick. (Mass.) 284; *Chadbourne v. Rackliff*, 30 Me. 354; *Mason v. Ham*, 36 Me. 573.

<sup>158</sup> *Poor v. Larrabee*, 58 Me. 543; *Fowle v. Coe*, 63 Me. 245.

<sup>159</sup> *Hannum v. Day*, 105 Mass. 34; *Personette v. Johnson*, 40 N. J. Eq. 173. Cf. ante, p. 174, c. 11.

It has already been said that the executor or administrator has the power to mortgage the personal estate to raise money to pay the debts, and in many states the power to mortgage the real estate is given by statute, which generally imposes the same conditions as in case of sale of real estate for the same purpose.<sup>160</sup>

*Power of Sale in Will Including Power to Mortgage.*

It is held that a power of sale of land given in a will may be construed to include a power to mortgage the estate. The principle upon which such an extension is made is that if the power is plainly, upon the face of the whole will, given to the executor for the purpose of discharging a particular burden upon the estate of the testator, and it is evident that the object may be better attained by a mortgage upon the land than by a sale of it, the court will construe the power to sell as including a power to mortgage.<sup>161</sup>

**SAME—POWER TO PERFECT DECEDENTS' CONVEYANCES.**

**119. In many states statutes give executors and administrators power to perfect conveyances and contracts to convey made by the deceased.**

Many miscellaneous powers are given to executors or administrators in regard to sales or conveyances of land, by statute in various states, to which the reader is referred. In many states a special statutory power is given, by which an executor or administrator may be licensed by the probate court to convey, by proper deed, real estate which the deceased has sold or contracted to convey.<sup>162</sup> In this case the license of the probate court merely authorizes the executor or administrator to make the conveyance. The title passes by the deed, and not by the order of the court.<sup>163</sup> The license will be granted only when the contract of the deceased is valid and binding, not when

<sup>160</sup> See ante, pp. 277, 280; *Thomas v. Parker*, 32 Pac. 562, 97 Cal. 456. But a decree authorizing a mortgage cannot be entered on a petition and notice of leave to sell. *Edwards v. Baker* (Ind.) 44 N. E. 467.

<sup>161</sup> *Loebenthal v. Raleigh*, 36 N. J. Eq. 171.

<sup>162</sup> Mass. St. 1783, c. 32, § 4; *Root v. Blake*, 14 Pick. (Mass.) 271.

<sup>163</sup> *Grant Coal Co. v. Clary*, 59 Md. 441.

it is not capable of enforcement; for example, when it is oral, and therefore bad under the statute of frauds.<sup>164</sup> The executor has no power to deliver a deed made by the deceased. He must apply for leave to make a new deed.<sup>165</sup>

<sup>164</sup> Bates v. Sargent, 51 Me. 423.

<sup>165</sup> Karman v. Hooper, 3 Watts & S. 253.

## CHAPTER XVII.

### PAYMENT OF DEBTS AND ALLOWANCES—INSOLVENT ESTATES.

- 120-121. General View.
- 122-124. Priority of Debts.
  - 125. Widow's Allowance.
  - 126. Expenses of the Funeral and Last Illness.
- 127-129. Costs of Administration.
  - 130. Debts Due to the United States.
  - 131. Taxes and Public Debts.
  - 132. Debts Due in Fiduciary Capacity.
  - 133. Judgment Debts—Record Debts.
  - 134. Servants' Wages.
  - 135. Rents.
  - 136. Liens—Mortgages—Specialty Debts.
- 137-138. Simple Contract Debts.
- 139-140. Valid Debts Only are Payable.
- 141-143. Presentation and Allowance of Claims.
- 144-146. Insolvent Estates.

### GENERAL VIEW.

120. Disbursements by an executor or administrator may be divided into two classes:

- (a) Payment of debts.
- (b) Distribution of the estate.

121. "Debts," in this connection, are understood to include expenses of the last illness and funeral, widow's allowance, and costs and charges of administration, although these are not strictly debts of the deceased.

### PRIORITY OF DEBTS.

122. The order of priority in which debts are to be paid is fixed by statute in the various states. The states which have the fullest classification of debts give the following rank:

- (a) Widow's allowance.

- (b) Funeral expenses and expenses of last illness.
- (c) Costs of administration.
- (d) Debts due to the United States.
- (e) Taxes and public debts due to the state, county, or city.
- (f) Debts owing in a fiduciary capacity.
- (g) Judgments rendered in life of decedent.
- (h) Wages.
- (i) Rents.
- (j) Mortgages, liens, and specialties.
- (k) Simple contract debts.

123. Other states give priority to several of these classes, but not to all.

124. The effect of classification of debts is that all of a higher class are to be paid in full before any of a lower class, and, as between those of the same class, all take the same percentage of their total amount.

In the present chapter it is intended to discuss the payment of debts, including the expenses of last illness and funeral, the widow's allowance, and the costs of administration, which, except the widow's allowance, are generally treated as part of the debts of the estate, and are disbursements which are to be made before the distribution of the estate.

The order of priority of payment of debts is settled by statute in most states, to which statutes careful reference must be made by the executor or administrator to determine upon his proper course of action. The order of priority stated in the black-letter text above is the order which subdivides with greatest care the various classes. In many of the others the subdivisions are not so numerous, a common rule being that, after funeral expenses and expenses of last illness, widow's allowance, and cost of administration, the only preferences are public debts (as taxes and the like) due to the United States and to state, county, or city corporations. As between debts of the same class, all share proportionately in the assets, if these are not sufficient to pay the whole class in full, while each preferred class

is to be paid in full before the next lower class takes anything.<sup>1</sup> Preferred debts are also entitled to have such interest as may be legally due on them paid, before any payment is made on the class below.<sup>2</sup>

### WIDOW'S ALLOWANCE.

125. A portion of the husband's estate is given by statute, in most states, for the immediate support of the widow and of the children after the husband's death. This portion is called the widow's allowance, and generally consists of a certain quantity of provisions, and a certain amount of property up to a limited value, which is fixed either by statute or by the judge of probate. This allowance either takes precedence of all debts and charges upon the estate, or ranks immediately after the expenses of last illness and funeral. The amount of the allowance, unless regulated by statute, is fixed by the judge of probate, in his discretion, upon due consideration of all the circumstances of the estate and the condition of the widow and children.

The widow's allowance is not strictly a debt of the estate;<sup>3</sup> but as it is generally the first disbursement that an executor or administrator is called upon to make, it is considered here, in advance of the payment of debts and other charges of the estate.<sup>4</sup> This allowance is wholly statutory, and is entirely distinct from any rights which she may have later, as distributee of the estate, or as dowress, or her quarantine in the real estate. Nor is it the same as the "paraphernalia" at common law, which was the apparel and ornaments of the wife suitable to her rank and degree, which the husband had given her in his life, and which will be discussed later.

<sup>1</sup> Ritter's Estate, 11 Phila. 12; Bennett v. Ives, 30 Conn. 329.

<sup>2</sup> Shultz's Appeal, 11 Serg. & R. (Pa.) 182.

<sup>3</sup> Babcock v. Probate Court, 30 Atl. 461, 18 R. I. 555.

<sup>4</sup> Mass. Pub. St. c. 135, § 2; N. Y. 3 Rev. St. (7th Ed.) pp. 2295, 2297; Brightly Purd. Pa. Dig. "Decedents' Estates," § 64; N. J. Revision, "Orphans' Court," § 52; Md. Rev. Code, art. 50, §§ 142, 143.

The amount of the allowance varies with the situation of the parties, the amount of the estate, its solvency, and other causes guiding the discretion of the court. The allowance may equal the whole personal property, unless that amount is extravagant, considering the situation of the family;<sup>5</sup> but if the probate judge makes an allowance which the supreme court on appeal deems more than is necessary, on all the facts of the case, it will be reduced by them.<sup>6</sup> But the decree will not be reversed unless the decision is clearly shown to be erroneous upon a question of fact.<sup>7</sup> Where the court made an allowance of \$5,000 to a widow, and the creditors appealed, and it was shown that the estate was insolvent; the personal estate was valued at \$165,000; there was no real estate; that the debts amounted to \$270,000; that the widow had an income of \$1,200 a year, and was living at her father's, who was a man of property, and charged her nothing for board and lodging; that there were no children,—the allowance was reduced to \$500.<sup>8</sup>

The better rule is that the financial circumstances of the widow and children, in respect to her and their own separate property, should be considered by the court in making the allowance, for it is intended merely to protect them from want.<sup>9</sup> But in some states the rule seems to be that the allowance is not based on the fact that the widow has no other property or means of support, and it may be made although she has other property.<sup>10</sup>

The judge of probate cannot revoke an allowance once made, and make a less one, for when the allowance is once made the widow has a vested right in it.<sup>11</sup> If the first allowance is insufficient, a second may be made at any time before the personal estate is exhausted,<sup>12</sup> but the court may require further proof of the necessity of the sec-

<sup>5</sup> *Brazer v. Dean*, 15 Mass. 183.

<sup>6</sup> *Washburn v. Washburn*, 10 Pick. (Mass.) 374; *Allen v. Allen*, 117 Mass. 27.

<sup>7</sup> *Allen v. Allen*, 117 Mass. 27.

<sup>8</sup> *Dale v. Bank*, 29 N. E. 371, 155 Mass. 141.

<sup>9</sup> *Dale v. Bank*, 29 N. E. 371, 155 Mass. 141.

<sup>10</sup> *Sawyer v. Sawyer*, 28 Vt. 245; *Lux's Estate*, 35 Pac. 341, 100 Cal. 593; *Palethorp's Estate*, 34 Wkly. Notes Cas. 68.

<sup>11</sup> *Pettee v. Wilmarth*, 5 Allen (Mass.) 144; *Ford's Estate*, 50 N. W. 409, 80 Wis. 565. Except out of new assets. *Paine v. Forsaith*, 24 Atl. 590, 84 Me. 66.

<sup>12</sup> *Hale v. Hale*, 1 Gray (Mass.) 522. But see *Davis v. Gower*, 26 Atl. 1048, 85 Me. 167.

ond allowance.<sup>13</sup> If the widow selects specific articles, at their appraised value, up to the amount allowed her by the court, and the administrator, by her consent, sells these articles at auction, he should pay her only the amount received from the sale of those articles.<sup>14</sup> The allowance is to be made out of the personal estate only, and cannot be made from the proceeds of sales of the real estate.<sup>15</sup> If the only personal estate is what came to the deceased as a surviving partner of a firm dissolved by the prior death of the other partner, and that estate is insufficient to pay the partnership debts, still an allowance should be made to the widow of the second partner out of these assets.<sup>16</sup> If the widow, by virtue of having been administratrix, has funds in her hands sufficient to pay her allowance, and retains them, she cannot enforce the allowance against her successor in office.<sup>17</sup>

The method of accounting for a payment of the allowance is for the administrator or executor to make up his accounts, charging himself with all the personal property, and crediting himself with the sums paid to the widow, or with the specific articles taken by her, if that is the order of allowance.<sup>18</sup> The right to an allowance is merely personal, intended to support the widow, and, if she dies, does not go to her personal representatives,<sup>19</sup> and belongs to the widow alone, even if there are children, unless otherwise specified by statute;<sup>20</sup> but if, after the allowance is fixed, the widow demand the allowance, and it is refused to her or not paid, or if she select certain articles of personal estate and take possession of them, but does not retain possession, in either case, if she afterwards die, her representatives may have an action for the allowance, or for the specific articles or their value.<sup>21</sup>

The right to the allowance is fixed at the time of the death of the

<sup>13</sup> *Pulling v. Durfee*, 50 N. W. 319, 88 Mich. 387.

<sup>14</sup> *Kingsbury v. Wilmarth*, 2 Allen (Mass.) 310.

<sup>15</sup> *In re Lloyds Estate*, 44 Mo. App. 670.

<sup>16</sup> *Bush v. Clark*, 127 Mass. 113.

<sup>17</sup> *King v. Johnson*, 21 S. E. 895, 94 Ga. 665.

<sup>18</sup> *Kingsbury v. Wilmarth*, 2 Allen (Mass.) 310. Cf. *In re Lux's Estate*, 35 Pac. 345, 100 Cal. 606.

<sup>19</sup> *Adams v. Adams*, 10 Metc. (Mass.) 170.

<sup>20</sup> *Nevins' Appeal*, 47 Pa. St. 230; *King's Appeal*, 84 Pa. St. 345.

<sup>21</sup> *Drew v. Gordon*, 13 Allen (Mass.) 120.



decendent, and as to children, if there were some who were then of an age to receive part of the allowance, the widow can claim it for them, although at the time the claim is made they are over the age for receiving the allowance.<sup>22</sup> In Missouri, children under 16 years of age are entitled to similar allowance out of their mother's estate, if she was a widow at her death.<sup>23</sup> Although the right of the widow is a personal one, yet the application may be made for her by her son, even if he is the executor.<sup>24</sup>

The allowance of the widow, in most states, takes precedence of all the expenses of administration and funeral expenses, and of all debts of the estate, and must be first satisfied,<sup>25</sup> and may be made independently of any reservation of homestead.<sup>26</sup> As this right is prior to all others, it is held that, if the amount allowed is reasonable, the fact that the executor or administrator was not notified of the application will not necessarily invalidate the allowance.<sup>27</sup> And if the executor or administrator has oral information of the application, and so far takes part in the proceedings as to inform the judge of the financial conditions and circumstances of the widow, he cannot object to the allowance.<sup>28</sup> If the statute provides for an annual allowance, and the widow obtains an allowance in gross for more years than the statute allows, and the annual portions cannot be distinguished, the whole allowance is void.<sup>29</sup> As this allowance is personal to the widow and children, and intended for their support, it can be applied for only in one administration, if there are administrations in several states, and that one must be the administration at the domicile of the deceased.<sup>30</sup> In New Jersey, the allowance is to be made by the executor or administrator, and the court only acts in case he fails to

<sup>22</sup> *In re Hayes*, 16 S. E. 904, 112 N. C. 76.

<sup>23</sup> *Baer v. Pfaff*, 44 Mo. App. 35.

<sup>24</sup> *In re Garrity's Estate*, 38 Pac. 628, 108 Cal. 463.

<sup>25</sup> *Hildebrand's Appeal*, 39 Pa. St. 133; *In re Dennis' Estate*, 24 N. W. 746, 67 Iowa, 110; *In re Norton's Estate*, 1 Lack. Leg. News (Pa.) 3.

<sup>26</sup> *In re Garrity's Estate* (Cal.) 38 Pac. 628. Even before paying funeral expenses, *Weir's Estate*, 10 Pa. Co. Ct. R. 187.

<sup>27</sup> *Babcock v. Probate Court*, 30 Atl. 461, 18 R. I. 555.

<sup>28</sup> *Bacon v. Perkins*, 58 N. W. 835, 100 Mich. 183.

<sup>29</sup> *Hill v. Lewis*, 18 S. E. 63, 91 Ga. 796.

<sup>30</sup> *Smith v. Howard*, 29 Atl. 1008, 86 Me. 203; *Graham v. Stull*, 22 S. W. 738, 92 Tenn. 673.

do so, or makes an allowance which is plainly insufficient or excessive.<sup>31</sup> The fact that a widow has, by antenuptial contract, for a valuable consideration, waived all claim upon her husband's estate, does not prevent her from receiving an allowance,<sup>32</sup> nor can her husband deprive her of this right by waiving it in favor of a creditor.<sup>33</sup>

### *Effect of a Will.*

The fact that there is a will does not invalidate this claim, and although the widow may have accepted the provision made in the will in lieu of dower, she may still have an allowance,<sup>34</sup> or even though the provision of the will is in lieu of the allowance.<sup>35</sup> It has been held, however, that, where a widow has waived the provisions made for her under her husband's will, and his estate is solvent, the personal estate amounting to about \$5,000 and the real estate to about \$22,000, and the judge of probate has decreed that the widow shall have no allowance except her apparel, this decree will not be reversed on appeal to the supreme court.<sup>36</sup> The widow may so delay and neglect to claim her right as to lose it,<sup>37</sup> and it is held that if she does not claim it before the estate is paid out to creditors or fully administered, or otherwise put in such a condition that it would be unjust to others to allow her claim, she has waived it.<sup>38</sup> But if the delay is sufficiently explained, the allowance may be granted.<sup>39</sup>

### *How Right Lost.*

The right to the allowance depends upon the existence of a valid marriage, since the claim is made as widow of the deceased. If there was no marriage, there can be no claim for allowance; and as the

<sup>31</sup> Read v. Patterson, 22 Atl. 1076, 47 N. J. Eq. 595.

<sup>32</sup> Blackinton v. Blackinton, 110 Mass. 461; Claypool v. Jaqua, 35 N. E. 285, 135 Ind. 499.

<sup>33</sup> Spencer's Appeal, 27 Pa. St. 218.

<sup>34</sup> Williams v. Williams, 5 Gray (Mass.) 24; Compher v. Compher, 25 Pa. St. 31; Godman v. Converse, 57 N. W. 394, 38 Neb. 657. Contra, Shafer v. Shafer, 28 N. E. 867, 129 Ind. 394.

<sup>35</sup> Peebles' Estate, 27 Atl. 792, 157 Pa. St. 605.

<sup>36</sup> Currier's Appeal, 3 Pick. (Mass.) 375.

<sup>37</sup> Neill v. Kuhn, 15 Pa. Co. Ct. R. 565; Hoffeditz's Estate, 4 Pa. Dist. R. 125; In re Welch's Estate, 39 Pac. 805, 106 Cal. 427.

<sup>38</sup> Baskin's Appeal, 38 Pa. St. 65; Burk v. Gleason, 46 Pa. St. 297; Crense's Estate, 6 Phila. 72; Tibbin's Estate, 5 Phila. 100.

<sup>39</sup> In re Kelly's Estate, 14 Pa. Co. Ct. R. 51.

probate court in such matter takes the prima facie evidence in settling the rights of claimants, if the prima facie evidence is that there was no marriage, and that the claimant was not the wife of the deceased, no allowance will be made.<sup>40</sup> The right to allowance may also be lost by the misconduct of the wife. Thus, a wife who has deserted her husband, or who has been divorced from him a mensa et thoro for her fault, is not entitled to an allowance.<sup>41</sup> But a wife who has been deserted by her husband, without cause, may have her allowance.<sup>42</sup> A separation of the parties by mutual consent will not generally bar the right to an allowance. Thus, where a man and his wife lived apart for many years, but it did not appear that either had deserted the other, and he partially supported her and their daughter, it was held that she might have an allowance.<sup>43</sup> But where a woman had lived separate from her husband for many years, under articles of separation, and had considerable property of her own, and no children, the judge of probate refused to make her any allowance, and the supreme court, on appeal, refused to disturb this decree.<sup>44</sup>

#### *Other Provisions for Widow.*

Further provisions for the immediate support of the widow, upon her husband's death, are not infrequent. In some states the statute provides that provisions reasonably necessary for the support of the widow and family of the deceased for 40 days shall not be taken as assets or to pay debts, and in such case it is decided that the widow may, under these statutes, use whatever money of her deceased husband is in her possession, for her support and that of the family for the period of 40 days, provided the amount so used is what is reasonably necessary for that purpose.<sup>45</sup> But with this case may be

<sup>40</sup> State v. Lichtenberg, 29 Pac. 999, 4 Wash. 231.

<sup>41</sup> Platt's Appeal, 80 Pa. St. 501; Kahn's Estate, 16 Pa. Co. Ct. R. 72; Spier's Appeal, 26 Pa. St. 233; Tozer v. Tozer, 2 Am. Law Reg. 510; Hettrick v. Hettrick, 55 Pa. St. 290.

<sup>42</sup> Grieve's Estate, 30 Atl. 727, 165 Pa. St. 126.

<sup>43</sup> In re Shedd, 30 N. E. 1147, 133 N. Y. 601.

<sup>44</sup> Hollenbeck v. Pixley, 3 Gray (Mass.) 521; Ross' Estate, 6 Kulp (Pa.) 521.

<sup>45</sup> Fellows v. Smith, 130 Mass. 376. See similar provisions in Me. Rev. St. c. 64, § 48, and N. Y. 3 Rev. St. (7th Ed.) p. 2295.

compared another case,<sup>46</sup> in which it was held that the widow cannot retain for the payment of such expenses money earned by herself, or given her by her husband and retained in her hands at his death, but this money must be inventoried, and the administrator has no authority to allow the widow to retain it.

If there is a contest over a will, and a special administrator ad litem is appointed, he is, by statute, in some states, authorized to advance to the widow or any of the children an allowance for the support of herself or the children, not exceeding that portion of the income which she would be entitled to whether the will is proved or not.<sup>47</sup> This allowance, however, differs from the ordinary allowance.

### *Paraphernalia.*

At common law, the paraphernalia of a widow was the apparel and jewels which were suitable for her rank and station in life, which had been given her by her husband, and which she was at common law entitled to retain as her own after his death.<sup>48</sup> What is so suitable is a question for the court, considering the rank and station in life of the parties.<sup>49</sup> Several cases have arisen in England in which jewels and other valuable ornaments have been kept by the widow, and the retention justified by the courts, as being proper paraphernalia, the parties being in the rank of the nobility.<sup>50</sup> This principle of the common law has been recognized in almost all the states, either by statute or by judicial decisions. In many states, the rule is extended so as to give minor children their apparel also, and there is also in some states a limited money value of the articles which may be thus kept by the widow and children,<sup>51</sup> in which case the articles of apparel and ornament of the widow and minor children

<sup>46</sup> Washburn v. Hale, 10 Pick. (Mass.) 429. This latter case was decided before married women were allowed to own separate property.

<sup>47</sup> Mass. Pub. St. c. 130, § 13. See Shannon v. White, 109 Mass. 146. See, also, In re Welch's Estate, 39 Pac. 805, 106 Cal. 427.

<sup>48</sup> 2 Bl. Comm. 436.

<sup>49</sup> 2 Rop. Husb. & Wife, 141.

<sup>50</sup> Viscountess Bindon's Case, 2 Leon. 166; Hastings v. Douglass, Cro. Car. 343; Tipping v. Tipping, 1 P. Wms. 729.

<sup>51</sup> Mass. Pub. St. c. 135, § 1. See the statutes of each state for specific provisions.

belong to them, respectively.<sup>52</sup> At the present day, in many instances, the widow owns her apparel and ornaments in her own right, and the rule as to paraphernalia does not apply.

#### EXPENSES OF THE FUNERAL AND LAST ILLNESS.

126. The debts which are entitled to payment before all others at common law, and immediately,—second only, in some states, to the widow's allowance,—are the funeral expenses and the charges of the last illness. The funeral expenses should be such as are necessary to bury the deceased in a manner suitable to his station in life and to the estate which he leaves behind him. If the executor or administrator be extravagant in this expense, it is a species of waste of the estate, and renders him personally liable, and does not prejudice the creditors and legatees.

It is evident that the amount which should properly be allowed by the court for the funeral expenses of the deceased must vary greatly with the condition of his estate, for expenses which might be proper and suitable if the estate is solvent would clearly be unsuitable if the estate was insolvent, as they would diminish the fund from which the payment of debts is to be made.<sup>53</sup> Necessary items of expense are coffin, shroud, hearse, and undertaker's fees, and these would be allowed even if the estate were insolvent.<sup>54</sup> The expenses of digging and filling the grave are also held to be among the necessary funeral expenses.<sup>55</sup> And if the deceased died away from home, the expense of transportation to his home, and of a person to attend such transportation, has been held a necessary expense.<sup>56</sup> Expenses of enter-

<sup>52</sup> Md. Rev. Code, art. 50, § 145; Me. Rev. St. c. 64, § 48.

<sup>53</sup> Sullivan v. Horner, 7 Atl. 411, 41 N. J. Eq. 300.

<sup>54</sup> Per Holt, C. J., Shelly's Case, 1 Salk. 296; per Lord Hardwicke, Stag v. Punter, 3 Atk. 119.

<sup>55</sup> Fairman's Appeal, 30 Conn. 205.

<sup>56</sup> Sullivan v. Horner, 7 Atl. 411, 41 N. J. Eq. 300; Hasler v. Hasler, 1 Bradf. Sur. (N. Y.) 248.

tainment of guests at the funeral have been said not to be properly part of the necessary funeral expenses in case of an insolvent estate.<sup>57</sup>

Rent for the place where the funeral is held might possibly be charged, if it is not furnished gratuitously, but it has been held that where the decedent died at the house of his aunt, where he had resided, and for which residence rent had been fully paid, she could not charge rent for the use of the house for the funeral.<sup>58</sup>

### *Gravestone.*

The authorities are not entirely harmonious whether a gravestone may be properly put at the grave by an executor or administrator when the estate is insolvent. In New Hampshire, the courts decide that in such case it is not a necessary funeral expense, and will not be allowed to the executor or administrator;<sup>59</sup> in Connecticut, it was said that none could be allowed when not approved previous to erection by the probate court;<sup>60</sup> and in Massachusetts, although it is now, by statute, allowed, if erected by an administrator or executor, yet it is held not to be a necessary funeral expense at common law.<sup>61</sup> Under the statute, however, the executor or administrator must, if requested by the widow and next of kin, pay, out of assets in his hands, for a gravestone and burial lot, if that is necessary.<sup>62</sup> If a third party takes upon himself to carry out a wish of the decedent for a monument, expressed to him just before the decedent's death, he cannot recover the amount from the administrator, if the latter refuses to pay for it.<sup>63</sup> In a case in Pennsylvania, the expense of a gravestone was held allowable, even against creditors.<sup>64</sup> The better rule seems to be that a gravestone suitable to the condition of the deceased is a proper funeral expense, even if the estate is insolvent, and statutes to this

<sup>57</sup> Per Holt, C. J., *Shelly's Case*, 1 Salk. 296; per Lord Hardwicke, *Stag v. Punter*, 3 Atk. 119.

<sup>58</sup> *McHugh's Estate*, 25 Atl. 875, 152 Pa. St. 442.

<sup>59</sup> *Brackett v. Tillotson*, 4 N. H. 208-210.

<sup>60</sup> *Fairman's Appeal*, 30 Conn. 205, 209.

<sup>61</sup> *Sweeney v. Muldoon*, 31 N. E. 720, 139 Mass. 307.

<sup>62</sup> *Id.*

<sup>63</sup> *Argo v. Donover*, 45 N. W. 744, 80 Iowa, 214.

<sup>64</sup> *Porter's Appeal*, 51 Leg. Int. (Pa.) 338.

effect have been enacted in many states.<sup>65</sup> Six hundred dollars has been held not too much for a monument, under the circumstances of the case, the estate being reasonably large.<sup>66</sup> But it has been held that \$2,000 was too much for a vault and tomb, when the whole estate was only \$17,000, under a statute which authorized a "reasonable charge for headstone";<sup>67</sup> and where the gravestone was considered too expensive, the cost was not allowed.<sup>68</sup> In another case, the cost of a monument erected to the deceased was disallowed, as being too great.<sup>69</sup> So, it has been held that \$1,300 is too much to pay for a burial lot, when another might have been bought for \$240.<sup>70</sup>

*Amount of Expenses Allowed.*

- No rule can be laid down as to the exact amount of money which the executor or administrator would be justified in expending on the funeral expenses. In every case, the probate court ultimately passes upon the propriety of this expenditure; but probably expenses incurred in good faith by an executor or administrator, and not obviously extravagant, would be allowed when the estate is solvent.<sup>71</sup> In one case it was held that \$60 was not too much, although the estate was not sufficient even to pay the widow's allowance;<sup>72</sup> nor \$300 out of a \$6,000 solvent estate;<sup>73</sup> nor \$127 out of a solvent \$800 estate.<sup>74</sup> If the executor or administrator is extravagant in this respect, he cannot be repaid out of the estate.<sup>75</sup>

<sup>65</sup> Webb's Estate, 30 Atl. 827, 165 Pa. St. 330; Porter's Estate, 77 Pa. St. 43; Tuttle v. Robinson, 33 N. H. 104, 117; Ferrin v. Myrick, 41 N. Y. 315; Wood v. Vandenburg, 6 Paige (N. Y.) 277, 285; Sweeney v. Muldoon, 31 N. E. 720, 139 Mass. 306; Pistorius' Appeal, 19 N. W. 31, 53 Mich. 350. See local statutes passim.

<sup>66</sup> Dudley v. Sanborn, 34 N. E. 181, 159 Mass. 185.

<sup>67</sup> In re Shipman, 31 N. Y. Supp. 571, 82 Hun, 108.

<sup>68</sup> Taylor's Estate, 3 Pa. Dist. R. 691.

<sup>69</sup> Spruance v. Darlington (Del. Ch.) 30 Atl. 663.

<sup>70</sup> Clemes v. Fox, 40 Pac. 843, 6 Colo. App. 377.

<sup>71</sup> M'Glinsey's Appeal, 14 Serg. & R. (Pa.) 64; Sullivan v. Horner, 7 Atl. 411, 41 N. J. Eq. 300.

<sup>72</sup> Hildebrand's Estate, 23 N. Y. Supp. 148, 1 Misc. Rep. 245.

<sup>73</sup> Howard's Estate, 23 N. Y. Supp. 836, 3 Misc. Rep. 170.

<sup>74</sup> Kittle v. Huntley, 22 N. Y. Supp. 519, 67 Hun, 617.

<sup>75</sup> 2 Bl. Comm. 508; Wilson v. Shearer, 9 Metc. (Mass.) 507; Sullivan v. Horner,

*Priority of Claim for Funeral Expenses.*

The funeral expenses are a prior charge over all debts of the decedent;<sup>76</sup> but the widow's allowance is preferred, in most states, to funeral expenses.<sup>77</sup> In New York, however, the funeral expenses rank first.<sup>78</sup> As funeral expenses are a preferred claim, the action against an executor or administrator for them may be brought immediately, without waiting for the year to elapse, since it is a claim not affected by the insolvency of the estate;<sup>79</sup> and, for the same reasons, the funeral expenses may be paid without waiting for previous approval from the probate court.<sup>80</sup> If the deceased was a married woman, her husband is by common law obliged to provide her with a funeral, and therefore cannot claim to be reimbursed for this expense out of her estate;<sup>81</sup> but, in any state where he is not under this obligation, he or a third person may have a preferred claim on her estate, if either pays the expenses of her funeral.<sup>82</sup>

*Personal Liability of Executor or Administrator.*

If the executor or administrator orders the funeral and interment, or if he ratifies and adopts the acts of another in ordering them, he is personally liable for these expenses, and an action to recover for them will be against him in his personal character, and the judgment will be de bonis propriis; and if he is compelled to pay these expenses, he must look to the estate for his remuneration,<sup>83</sup> and in such case he has a preferred claim upon the assets

7 Atl. 411, 41 N. J. Eq. 300. See Abb. Desc., Wills & Adm. §§ 151, 158; Mechem, Cas. Succ. p. 147 et seq.

<sup>76</sup> Sullivan v. Horner, 7 Atl. 411, 41 N. J. Eq. 300. See Abb. Desc., Wills & Adm. §§ 113, 128.

<sup>77</sup> See ante, p. 306; Loftis v. Loftis, 28 S. W. 1091, 94 Tenn. 232.

<sup>78</sup> In re Hildebrand's Estate, 23 N. Y. Supp. 148, 1 Misc. Rep. 245.

<sup>79</sup> Studley v. Willis, 134 Mass. 155.

<sup>80</sup> Dampier v. Trust Co., 49 N. W. 286, 46 Minn. 526.

<sup>81</sup> 4 Pa. Dist. R. 265.

<sup>82</sup> Kessler v. Hessen, 19 Abb. N. C. (N. Y.) 86; McClellan v. Filson, 5 N. E. 861, 44 Ohio St. 184.

<sup>83</sup> Sweeney v. Muldoon, 31 N. E. 720, 139 Mass. 306; Luscomb v. Ballard, 5 Gray (Mass.) 405; Brice v. Wilson, 8 Adol. & E. 349, note; Corner v. Shew, 3 Mees. & W. 350; Ferrin v. Myrick, 41 N. Y. 315; Williams, Ex'rs, 1788.



of the estate.<sup>84</sup> If, however, the funeral is ordered by a third person, and the executor has not assented to it, or in any way bound himself in regard to it, still he is liable for the expense,<sup>85</sup> though there seems to be some difference in the authorities as to the liability therefor. In England it is held that, in such case, the judgment will be against him *de bonis propriis*, because, from the necessity of the case, these acts must be performed by some one, and the law raises an implied promise by the executor or administrator to pay for the performance of these acts in a reasonable manner, but not in an extravagant or excessive style.<sup>86</sup> In Massachusetts, the same implied promise of the executor or administrator is recognized, but, by a somewhat anomalous course of procedure, the judgment is *de bonis testatoris* to the extent of assets only.<sup>87</sup> This procedure is based upon the theory that the furnishing of a funeral and interment is a necessity for which the estate is liable, just as for necessary supplies furnished to the deceased during his life or in his last sickness, and that, as the implied promise to pay for them cannot be laid to the deceased, since they were incurred after his death, it must be laid to the executor or administrator; yet, since the liability is not personal to him, the judgment should be *de bonis testatoris*.<sup>88</sup> If a third person pays the funeral expenses out of funds of the estate in his possession, this is an intermeddling with the estate which will make him executor *de son tort*.<sup>89</sup> If a third person pays the funeral and other preferred expenses, and the administrator gives him a note therefor, this note will not be a good claim against the estate, but against the maker.<sup>90</sup>

<sup>84</sup> *Loftis v. Loftis*, 28 S. W. 1091, 94 Tenn. 232.

<sup>85</sup> *Kessler v. Hessen*, 19 Abb. N. C. (N. Y.) 86; *Sweeney v. Muldoon*, 31 N. E. 720, 139 Mass. 306; *Hapgood v. Houghton*, 10 Pick. (Mass.) 154; *France's Appeal*, 75 Pa. St. 220; *Sullivan v. Horner*, 7 Atl. 411, 41 N. J. Eq. 300.

<sup>86</sup> *Corner v. Shew*, 3 Mees. & W. 350.

<sup>87</sup> *Hapgood v. Houghton*, 10 Pick. (Mass.) 154; *Luscomb v. Ballard*, 5 Gray (Mass.) 405; *Kingman v. Soule*, 132 Mass. 288.

<sup>88</sup> See *Hapgood v. Houghton*, 10 Pick. (Mass.) 154.

<sup>89</sup> *Walton v. Hall's Estate*, 29 Atl. 803, 66 Vt. 455. Cf. ante, p. 137, c. 9.

<sup>90</sup> *In re Kirkpatrick's Estate*, 30 N. Y. Supp. 283, 9 Misc. Rep. 228. Cf. ante, p. 259, c. 15.

*Expenses of Last Illness.*

In many states, by statute, the funeral expenses are extended so as to include the expense of the last illness of the deceased.<sup>91</sup> The question whether the expenses claimed were incurred in the last illness of the deceased is a question of fact, and is for the jury if the case comes before that tribunal; otherwise it is for the court. It has been said that any illness which terminates in death may be so called.<sup>92</sup> All sums paid for the expenses of the last illness are of equal degree, and should be paid ratably, if there is a deficiency of assets.<sup>93</sup> But in New Jersey it has been held that the physician's bill should be paid before the funeral expenses.<sup>94</sup>

**COSTS OF ADMINISTRATION.**

127. The costs of administration include all expenditures which an executor or administrator is obliged to pay out for the due administration of the estate, such as expenses of probating the will, and securing a decree of appointment, costs of suit brought by or against him in defense of the estate, costs of proceedings proper to the settlement of the estate in the probate court, and the like.

128. Costs of administration do not include costs of legal proceedings in which the personal interest only of the executor or administrator is concerned, nor business expenditures made for his personal convenience.

129. Costs of administration are generally preferred over the payment of other debts, second only to the funeral expenses and costs of last illness.

<sup>91</sup> Wilson v. Shearer, 9 Metc. (Mass.) 507; Huse v. Brown, 8 Greenl. (Me.) 167; Flitner v. Hanly, 18 Me. 271; Brightly, Purd. Pa. Dig. "Decedents' Estates," § 94; Reese's Estate, 2 Pears. (Pa.) 482; N. J. Revision, "Orphans' Courts," § 58; Ohio Rev. St. § 6090; McClellan v. Filson, 5 N. E. 861, 44 Ohio St. 184. See local statutes in every state for local provisions.

<sup>92</sup> Huse v. Brown, 8 Greenl. (Me.) 169.

<sup>93</sup> Bennett v. Ives, 30 Conn. 329.

<sup>94</sup> Fowler v. Colt, 22 N. J. Eq. 44.

The costs of administration may be either for legal proceedings or for business expenditures. In either case, the deciding rule is the same, that if the disbursement was for the interest of the estate, and was such as a prudent business man would make, the item will be allowed the executor or administrator in his accounts. As to legal expenses, it has been held that any costs incurred by him in legal proceedings not connected with his duties will not be allowed. Therefore, an administrator pendente lite cannot be allowed costs of an issue to try the validity of the will;<sup>95</sup> but an executor may be allowed the costs of establishing the will,<sup>96</sup> or of resisting a later forged will.<sup>97</sup> An administrator who is afterwards superseded by an executor, a will having been found and proved, may be allowed in his account for the expenses of his administration, but not for expenses and counsel fees incurred in opposing the probate of the will.<sup>98</sup>

Among the items usually allowed in an executor's or administrator's accounts are the sums paid by him for counsel fees in cases which he has brought or defended in the interest of the estate. This allowance is in some states established by statute; in others, it is given by the decided cases.<sup>99</sup> The allowance of such charges depends entirely upon whether the proceedings in which they were incurred were properly undertaken by the executors or administrators; and this question is decided by the probate court.<sup>100</sup> If the suit was not proper to the duties of his office, such fees will not be allowed. Thus, for instance, it has been held that an administrator cannot be allowed for fees paid to counsel employed by him to oppose probate of a will discovered after his appointment

<sup>95</sup> *Dietrich's Appeal*, 2 Watts (Pa.) 332.

<sup>96</sup> *In re Scott's Estate*, 9 Watts & Serg. (Pa.) 98; *Hazard v. Engs.* 14 R. I. 5.

<sup>97</sup> *In re Whitaker's Estate*, 38 Leg. Int. (Pa.) 402, 412.

<sup>98</sup> *Edwards v. Ela*, 5 Allen (Mass.) 90.

<sup>99</sup> *Foster's Ex'x v. Stone*, 31 Atl. 841, 67 Vt. 336; *Nichols v. Reyburn*, 55 Mo. App. 1; Me. Rev. St. c. 63, § 32; *Kingsland v. Scudder*, 36 N. J. Eq. 285; *Dey v. Codman*, 39 N. J. Eq. 258; *Forward v. Forward*, 6 Allen (Mass.) 497; *Sterrett's Appeal*, 2 Pen. & W. (Pa.) 419; *In re Brigham's Estate*, 1 Leg. Gaz. (Pa.) 31; *In re Taylor's Estate*, 3 Pa. Dist. R. 691; *In re Spooner's Will*, 33 N. Y. Supp. 136, 86 Hun, 9; *In re Hutchison's Estate*, 32 N. Y. Supp. 869, 84 Hun, 563.

<sup>100</sup> *Kingsland v. Scudder*, 36 N. J. Eq. 285; *Forward v. Forward*, 6 Allen (Mass.) 497; *St. John v. McKee*, 2 Dem. Sur. (N. Y.) 236.

as administrator.<sup>101</sup> So, when the executors unsuccessfully resist an application to compel them to give further security, they will not be allowed counsel fees in the matter.<sup>102</sup> An executor or administrator cannot be allowed for services rendered by an attorney which might as well have been done by the executor or administrator himself,—as, for instance, searching for deceased's will, procuring papers and securities of deceased from a bank which had custody of them, or being present at making the inventory, or preparing and posting notices of sale, or writing to agents having charge of the interests out of the estate for information concerning them,<sup>103</sup> or merely clerical business,<sup>104</sup>—but may be allowed for attorney's services in preparing petition for appointment, and presenting it, obtaining consent of next of kin to appointment, obtaining appointment of appraisers, and preparing notice to creditors, and causing notices to be posted and served.<sup>105</sup> The claim of an attorney for compensation in reducing a claim and compromising it, several years after the death of the intestate, and solely on a contract with the administratrix, is a claim against her personally, and not against the estate.<sup>106</sup> If the executor or administrator act as his own attorney in matters relating to the estate, he will not be allowed any compensation, though he does so in good faith, and with skill and diligence.<sup>107</sup> An executor may be allowed for legal services of an attorney in the matter of accounting,<sup>108</sup> and so for legal services in obtaining an order of the court allowing the erection of a monument or tombstone.<sup>109</sup> A charge of \$15 for counsel fees in the matter of preparing and having approved an executor's bond has been held excessive.<sup>110</sup> A counsel fee for general advice

<sup>101</sup> *Edwards v. Ela*, 5 Allen (Mass.) 88; *In re Parsons' Estate*, 3 Pac. 817, 65 Cal. 240.

<sup>102</sup> *In re O'Brien*, 25 N. Y. Supp. 704, 5 Misc. Rep. 136.

<sup>103</sup> *In re Van Nostrand*, 24 N. Y. Supp. 850, 3 Misc. Rep. 396.

<sup>104</sup> *In re Beach's Estate*, 22 N. Y. Supp. 1079, 1 Misc. Rep. 27.

<sup>105</sup> *Id.*

<sup>106</sup> *Lusk v. Patterson*, 30 Pac. 253, 2 Colo. App. 306.

<sup>107</sup> *In re Howard's Estate*, 23 N. Y. Supp. 836, 3 Misc. Rep. 170.

<sup>108</sup> *In re Hodgman's Estate*, 23 N. Y. Supp. 725, 69 Hun, 484; *In re Meeker's Estate*, 45 Mo. App. 186.

<sup>109</sup> *Dudley v. Sanborn*, 34 N. E. 181, 159 Mass. 185.

<sup>110</sup> *Barton's Appeal*, 18 Atl. 902, 131 Pa. St. 359.

and assistance about making sale of real estate to pay debts will be allowed, if it is not excessive.<sup>111</sup> Expenses incurred by the executor or administrator simply in protecting his own interests cannot be allowed.<sup>112</sup> Expenses incurred in a law suit in another state, in behalf of the estate, will not be allowed, if the applicant was not a party to the suit, but was merely assisting the administrator in the other state. The claim should be made in the other state.<sup>113</sup>

The executor or administrator is also allowed the reasonable expenses necessarily incurred in the proper execution of his trust, of whatever nature they may be. The propriety of the expenses is always a matter to be decided by the probate court; and if the expenses appear to have been incurred in good faith, and in managing the estate in a proper way, they will be allowed.<sup>114</sup> Thus, where the executor claimed an allowance for brokerage commissions paid to one who negotiated a sale of real estate belonging to the estate, the charge was allowed. So, traveling expenses, when they are actually incurred by the executor or administrator in the duties necessarily incident to the settlement of the estate, are to be allowed in his accounts.<sup>115</sup> But the employment of a bookkeeper will not be allowed, if it was not necessary for the estate, and was merely done because the executor was a busy man and would have done so in his own matters.<sup>116</sup>

In regard to the expenses incident to the care of real estate, as the administrator generally has nothing to do with it, he cannot ordinarily be allowed, in his accounts, for taxes assessed upon the real estate after the death of the owner, and paid by the adminis-

<sup>111</sup> Id.

<sup>112</sup> *In re Glynn's Estate*, 58 N. W. 684, 57 Minn. 21; *McClelland v. Bristow*, 35 N. E. 197, 9 Ind. App. 543; *Wakefield v. Gilleland's Adm'r* (Ky.) 18 S. W. 768; *Barton's Appeal*, 18 Atl. 902, 131 Pa. St. 359.

<sup>113</sup> *Brand v. Com.* (Ky.) 24 S. W. 604. Cf. ante, p. 151, c. 10.

<sup>114</sup> *Mass. Pub. St. c. 144, § 7*; *Jennison v. Hapgood*, 10 Pick. (Mass.) 77; *Forward v. Forward*, 6 Allen (Mass.) 498; *R. I. Pub. St. c. 190, § 7*; *Vt. Rev. Laws, § 2104*; *Md. Rev. Code, art. 50, § 214*; *Dey v. Codman*, 39 N. J. Eq. 268; *In re Wilson's Estate*, 2 Pa. St. 325.

<sup>115</sup> *Dey v. Codman*, 39 N. J. Eq. 268; *Bechtold v. Read* (N. J. Ch.) 28 Atl. 264.

<sup>116</sup> *In re Harbeck*, 30 N. Y. Supp. 521, 81 Hun, 26.

trator (for the title to the real estate is in the heirs, and the taxes should be paid by them),<sup>117</sup> or for any sums expended on account of the real estate.<sup>118</sup> In the case of an executor, much depends upon the will. If the title to the real estate vests at once in the devisees, the executor cannot be allowed for taxes or insurance, or repairs on the real estate;<sup>119</sup> but if he has the care of and title to the real estate to carry out the purposes of the will, he may be allowed for such expenditures in his account;<sup>120</sup> and if he, in the exercise of a sound business discretion, thinks it best to expend money in order to bring the property up to a marketable state and increase its value, he will be allowed for such expenditure.<sup>121</sup>

Taxes on personal estate assessed to executor, and paid by him, will be allowed.<sup>122</sup> An executor, having a mere power to sell the land, may pay taxes so that the land will be readily salable.<sup>123</sup> Taxes assessed on land sold for the payment of debts, after the sale, will not be allowed in the accounts.<sup>124</sup> If the real estate is left to a devisee to occupy temporarily, as for life, either by a legal or equitable title, the occupant should pay the taxes and repairs; but the insurance, being a permanent benefit to the estate, may be charged against it.<sup>125</sup>

### DEBTS DUE TO THE UNITED STATES.

**130.** By a statute of the United States it is enacted that, when the estate is insufficient to pay all debts, those due to the United States shall be first satisfied.

<sup>117</sup> *Polhemus v. Middleton*, 37 N. J. Eq. 240. Cf. ante, p. 273, c. 15.

<sup>118</sup> *McKinney v. Watson*, 8 Serg. & R. (Pa.) 347.

<sup>119</sup> *Aldridge v. McClelland*, 36 N. J. Eq. 290; *Jennison v. Hapgood*, 10 Pick. (Mass.) 77.

<sup>120</sup> *Dey v. Codman*, 39 N. J. Eq. 259; *Wiggin v. Swett*, 6 Metc. (Mass.) 194; *Watts v. Howard*, 7 Metc. (Mass.) 482.

<sup>121</sup> *Almy v. Probate Court*, 30 Atl. 458, 18 R. I. 612. Cf. ante, p. 254, c. 15.

<sup>122</sup> *Williams v. Herrick*, 25 Atl. 1099, 18 R. I. 120. Cf. ante, p. 273, c. 15.

<sup>123</sup> *Dunn's Ex'rs v. Renick*, 10 S. E. 810, 33 W. Va. 476.

<sup>124</sup> *Ambleton v. Dyer*, 13 S. W. 926, 53 Ark. 224.

<sup>125</sup> *Wiggin v. Swett*, 6 Metc. (Mass.) 194.

This statute<sup>126</sup> is interpreted by the federal courts to be binding upon the estate, whether the state statutes recognize this priority or not.<sup>127</sup> And this interpretation is correct, as the power to secure debts due to it is an important supplementary power to the operation of the federal government.<sup>128</sup> The statute, however, creates no lien upon the property of the estate, but is merely a general direction for the executor or administrator, and renders him personally liable if he does not follow it.<sup>129</sup> In many states, statutes recognize expressly this preference, and the debt is payable after funeral expenses, costs of administration, and widow's allowance.<sup>130</sup>

#### TAXES AND PUBLIC DEBTS.

### 131. Taxes and debts due to the state, or to a county or municipality, are, in many states, preferred to ordinary debts.

The statutes of the states differ widely on this point, as on many others, in regard to the preference of debts, and must be consulted specially in each case. Taxes would not include an assessment for street improvement which is only a charge on the land, and not a personal debt of the deceased.<sup>131</sup> In Pennsylvania, debts due to the commonwealth are to be paid last,<sup>132</sup> and in New Jersey no preference is given them.<sup>133</sup>

<sup>126</sup> U. S. Rev. St. §§ 3466, 3467; *U. S. v. Fisher*, 2 Cranch, 358.

<sup>127</sup> *U. S. v. Fisher*, 2 Cranch, 358, 385.

<sup>128</sup> *Id.*

<sup>129</sup> See Rev. St. § 3467; *U. S. v. Hooe*, 3 Cranch, 73, 88; *Brent v. President*, etc., 10 Pet. 596.

<sup>130</sup> *U. S. v. Hahn*, 37 Mo. App. 580. Consult local statutes for special instances.

<sup>131</sup> *In re Hun*, 39 N. E. 376, 144 N. Y. 472; *Id.*, 28 N. Y. Supp. 253, 7 Misc. Rep. 409.

<sup>132</sup> Brightly, *Purd. Dig. "Decedents' Estates,"* § 94.

<sup>133</sup> 4 *Griff. Law Reg.* (N. J.) 1282, note 2.

**DEBTS DUE IN A FIDUCIARY CAPACITY.**

132. In some states, debts due by the estate for trust funds, in cases where the fund itself cannot be identified and separated from the rest of the estate, are made preferred debts.

The hardship of preventing cestuis que trustent from occupying any position, except as ordinary creditors of the estate, which may result in the total or partial loss of the fund to them, unless it can be separated and identified from the rest of the estate, has resulted, in a few states, in the enactment of statutes by which, in such case, the fiduciary debt is preferred to ordinary debts. If the trust moneys or securities can be separated from the rest of the estate, and identified, they form no part of it;<sup>134</sup> but if not, the cestuis are, in the absence of statute, only ordinary creditors.<sup>135</sup>

**JUDGMENT DEBTS—RECORD DEBTS.**

133. In some states, judgment debts and debts of record of the deceased are given the preference over simple contract debts.

Thus, in New Jersey, a judgment entered of record in the lifetime of the decedent is entitled to preference.<sup>136</sup> And, in Maryland, a judgment comes next after taxes and rents.<sup>137</sup> In New York, preference is given to judgments docketed and decrees enrolled, over other debts; and, as among themselves, a prior judgment is preferred to a later one.<sup>138</sup> Under this statute, an award made upon arbitration submitted to by executors does not give any priority of

<sup>134</sup> Hubbard v. Manufacturing Co., 36 Pac. 1053, 37 Pac. 625, and 53 Kan. 637. Contra, Shipherd v. Furness, 46 Ill. App. 319.

<sup>135</sup> Gaffney's Estate, 23 Atl. 163, 146 Pa. St. 49; Bobbitt v. Jones, 12 S. E. 267, 107-N. C. 658.

<sup>136</sup> N. J. Revision, "Orphans' Court," § 58.

<sup>137</sup> Md. Rev. Code, art. 50, § 173.

<sup>138</sup> Sherwood's Estate, 31 N. Y. Supp. 409, 83 Hun, 200; N. Y. 3 Rev. St. (7th Ed.) pp. 2298, 2299, § 27.



claim.<sup>139</sup> Nor does a judgment against an executor or administrator, but only against the deceased.<sup>140</sup> Therefore, a judgment for foreclosure of a mortgage which is not obtained until after the death of the mortgagor is not a judgment which is entitled to priority, under such a statute.<sup>141</sup>

One who obtains a judgment which is a lien on land may lose his right to enforce it, by long delay.<sup>142</sup>

#### SERVANTS' WAGES.

**134. In a few states, servants' wages, for a limited time previous to the death of the decedent, are given a preference over ordinary contract debts. They are generally put directly after the expenses of the funeral and last illness.**

Such a statute<sup>143</sup> has been said to be intended to protect domestics and menial servants,<sup>144</sup> but it has been held to include a bar-keeper.<sup>145</sup> The wages need not be for a time immediately preceding the death of the testator or intestate,<sup>146</sup> unless the statute prescribes this.<sup>147</sup>

#### RENTS.

**135. A claim for rent is, in some states, given by statute a priority to ordinary debts.**

Thus, in Pennsylvania it takes precedence over ordinary debts for one year previous to the decedent's death.<sup>148</sup> But interest on the

<sup>139</sup> Wood v. Tunncliffe, 74 N. Y. 45.

<sup>140</sup> Fliess v. Buckley, 90 N. Y. 292.

<sup>141</sup> Cook v. Jennings, 18 S. E. 640, 40 S. C. 204.

<sup>142</sup> Johnson v. Peck, 25 S. W. 865, 58 Ark. 580.

<sup>143</sup> Brightly, Purd. Pa. Dig., "Decedents' Estates," § 94; Mass. Pub. St. c. 137, § 1.

<sup>144</sup> Ex parte Meason, 5 Bin. (Pa.) 167.

<sup>145</sup> Boniface v. Scott, 3 Serg. & R. (Pa.) 351.

<sup>146</sup> Martin's Appeal, 33 Pa. St. 395.

<sup>147</sup> Mass. Pub. St. c. 137, § 1.

<sup>148</sup> Brightly, Purd. Dig., "Decedents' Estates," § 94.

rent is not preferred.<sup>149</sup> In New York, the surrogate may give rent precedence, if he thinks it is for the good of the estate;<sup>150</sup> but, in the absence of special circumstances, it is not a preferred debt.<sup>151</sup> In Maryland, any rent in arrears for which a distress might be levied is preferred to all claims, except for taxes.<sup>152</sup>

### LIENS—MORTGAGES—SPECIALTY DEBTS.

136. A species of preference in particular cases exists, where a creditor has a lien upon a specific piece of property for the payment of his debt. In such a case, if the lien is not dissolved by the death of the owner of the property, the holder of the lien is so far preferred that he may satisfy his debt, in priority to all other claims against the estate, out of the property to which the lien applies. But for any deficiency balance left after foreclosure of the lien he is only an ordinary creditor, and has no preference.

In case of the death of a mortgagor, the lien of the mortgage survives, and only the equity is assets of the estate.<sup>153</sup> The mortgage debt, however, is a debt of the deceased, which may be proved against his estate either in whole, by surrendering the security, or for a deficiency after foreclosing the security, as will be seen later.<sup>154</sup> In either case, no priority exists, for the only priority of the mortgage is against the property described in the mortgage deed.<sup>155</sup> As to that property, it makes no difference what other debts, preferred or common, are proved against the estate.<sup>156</sup> But if a sale is had, and a deficiency left in the debt after sale, and the mortgagee wishes to collect it out of the estate, he has no priority

<sup>149</sup> *In re Vandegriff's Estate*, 3 Pa. Dist. R. 421. See, also, *In re Morgan's Estate*, 11 Pa. Co. Ct. R. 536.

<sup>150</sup> N. Y. 3 Rev. St. p. 2299, § 30. Cf. ante, p. 209, c. 14.

<sup>151</sup> *Cooper v. Felter*, 6 Lens. (N. Y.) 485.

<sup>152</sup> Md. Rev. Code, art. 50, § 173.

<sup>153</sup> *Abby v. Fuller*, 8 Metc. (Mass.) 39. See ante, p. 212, c. 14.

<sup>154</sup> Post, p. 336.

<sup>155</sup> *Payne v. Johnson's Ex'rs*, 24 S. W. 238, 95 Ky. 175.

<sup>156</sup> Id.

over other debts.<sup>157</sup> Therefore, he cannot require the executor or administrator to pay the deficiency in full, if the estate is insolvent, for this would be to give him a priority over other debts.<sup>158</sup> If the mortgagee wishes to prove his claim against the estate, he must either relinquish the security and prove the whole debt, or he must realize upon the security and prove for the deficiency, if any is left.<sup>159</sup> In either event, the claim, so far as the mortgaged property is not relied upon, must be presented to the executor or administrator for payment, just as any other claim is required to be presented for payment.<sup>160</sup> Neither failure to present the claim for payment,<sup>161</sup> however, nor presenting it for payment,<sup>162</sup> has any effect upon the foreclosing of the mortgage. The pendency of a suit to foreclose the mortgage is not a presentation of the claim to the executor or administrator for payment, under the statutes requiring such presentation.<sup>163</sup> If one owns a note of the deceased, secured by a mortgage of personal property, and by order of the court, under statutory authority, the executor or administrator sells the mortgaged property free from the lien, as may be done by statutory authority in some states, for the purpose of getting money to pay the mortgage, the executor or administrator cannot use the proceeds of the sale to pay any other debts, even if the estate is insolvent.<sup>164</sup>

If one buys land which is subject to a mortgage, and as part of the consideration assumes the mortgage, and agrees to pay it, the debt cannot be paid out of the personal property of his estate, for the benefit of those entitled to the real estate, unless they indemnify the persons entitled to the personal estate.<sup>165</sup> The same rules apply to

<sup>157</sup> *Tucker v. Wells*, 20 S. W. 114, 111 Mo. 399.

<sup>158</sup> *Wentworth v. Machine Co.*, 39 N. E. 414, 163 Mass. 28.

<sup>159</sup> *Macgill v. Hyatt*, 30 Atl. 710, 80 Md. 253; *Tubb's Estate*, 28 Atl. 1109, 161 Pa. St. 252; *Scammon v. Ward*, 23 Pac. 439, 1 Wash. St. 179.

<sup>160</sup> *Andrews v. Morse*, 32 Pac. 640, 51 Kan. 30; *Roberts v. Flatt*, 32 N. E. 484, 142 Ill. 485, affirming 42 Ill. App. 608. Cf. post, p. 336.

<sup>161</sup> *Andrews v. Morse*, 32 Pac. 640, 51 Kan. 30; *Anglo-Nevada Assur. Corp. v. Nadeau*, 27 Pac. 302, 90 Cal. 393; *German Sav. & Loan Soc. v. Fisher*, 28 Pac. 591, 92 Cal. 502.

<sup>162</sup> *Moran v. Gardemeyer*, 23 Pac. 6, 82 Cal. 96.

<sup>163</sup> *Bush v. Adams*, 22 Fla. 177. Cf. post, p. 336.

<sup>164</sup> *Jewett v. Hurtle*, 23 N. E. 262, 121 Ind. 404.

<sup>165</sup> *In re Hunt* (R. I.) 32 Atl. 204.

other liens. Thus, one who has a mechanic's lien upon land and buildings may enforce it against the heirs into whose hands it comes.<sup>166</sup> But this is not true if the lien is dissolved by the death of the owner of the property. Thus, it was held that a person who has a mechanic's lien upon houses and lands could not prosecute the lien against the executors and administrators, and obtain payment of his debt out of the property, since the lien was dissolved by the death of the owner of the land, but was obliged to come in pro rata with the other creditors;<sup>167</sup> but contra if the lien continues for its full term, notwithstanding the death of the lien debtor.<sup>168</sup> In those states where judgments form a lien upon the real estate, the priority of debts as established by statute does not postpone judgment liens, although judgments have no priority by the statute.<sup>169</sup> A general creditor, having no special lien on any particular portion of the estate, cannot select any part he chooses, and subject it to a lien.<sup>170</sup> In the United States, with only one or two exceptions, specialty debts, i. e. bonds and sealed instruments, have no priority over simple contract debts; and even in England,<sup>171</sup> where they originally had a preference, this has been taken from them by statute.<sup>172</sup>

#### SIMPLE CONTRACT DEBTS.

137. Simple contract debts, unless by statute, have no priority, and if the assets are insufficient to pay all in full, all take the same proportionate payment.
138. In some states, by statute, debts filed or presented for payment within a limited time after the appointment of an executor or administrator have priority over those filed or presented after the expiration of that time.

<sup>166</sup> *Foster v. Stone's Heirs*, 20 Pick. 542.

<sup>167</sup> *Severance v. Hammatt*, 28 Me. 520.

<sup>168</sup> Me. Laws 1850, c. 159.

<sup>169</sup> *Wade's Appeal*, 29 Pa. St. 329. See ante, p. 324.

<sup>170</sup> *Hundley v. Taylor* (Ky.) 25 S. W. 887; *Strouse v. Lawrence*, 28 Atl. 930, 160 Pa. St. 421.

<sup>171</sup> *Pinchon's Case*, 9 Coke, 88b; *Williams, Ex'rs*, 1010.

<sup>172</sup> 32 & 33 Vict. c. 46.

All the simple contract debts of the deceased generally rank alike, and in case of insolvency each takes the same proportion as the others,<sup>173</sup> unless, by statute, debts filed or presented to the executor or administrator for payment in a limited time after the appointment of an executor or administrator are given priority over those filed or presented later, in which case the former are paid in full before the latter take anything.<sup>174</sup> Where such priority is given by statute, a creditor who has allowed the time to go by without filing his claim cannot restore its priority by asserting that he knew nothing of the rule as to priority, and that the executor or administrator promised that he would pay the debt in full if the creditor would first try to obtain payment from the principal debtor, the claim against the estate being as surety.<sup>175</sup> If the executor or administrator exhausts the estate by paying the preferred debts, this prevents the common debts from recovering anything, either against the estate or the executor or administrator personally, and the same is true of a lower class of preferred debts, if the estate is exhausted in paying a higher.<sup>176</sup>

#### VALID DEBTS ONLY ARE PAYABLE.

**139.** The executor or administrator is neither bound nor allowed to pay any claims which are not valid, legal debts of the estate. Claims barred by either the general statute of limitations or by special statutes relating to executors or administrators cannot be paid.

**140.** An executor or administrator may prove and retain his own claims against the estate, in the same manner and to the same amount as similar claims of other creditors.

<sup>173</sup> *Bennett v. Ives*, 30 Conn. 335; R. I. Pub. St. c. 186, § 1; Me. Rev. St. c. 66, § 1; Mass. Pub. St. c. 137, § 1.

<sup>174</sup> *Jones v. Davis*, 37 Mo. App. 69. As to presentation for payment, see post, p. 336.

<sup>175</sup> *Kells v. Lewis*, 58 N. W. 1074, 91 Iowa, 128.

<sup>176</sup> Went. Off. Ex'r (14th Ed.) 261.

The executor or administrator is not bound to pay anything except legal debts of the deceased.<sup>177</sup> Thus, if the deceased was an infant, the executor need not pay a claim against him which is not for necessities.<sup>178</sup> So, he need not pay a supposed liability (not warranted by statute) of the deceased as stockholder in an insolvent corporation.<sup>179</sup> So he cannot be reimbursed where he pays for the schooling, feeding, and clothing of the children of the deceased, subsequent to his decease,<sup>180</sup> or puts out money in repairs of buildings forming part of the real estate, unless he has charge of it,<sup>181</sup> or spends money for ardent spirits used at an auction of the goods of the deceased,<sup>182</sup> or pays a doctor who had attended the deceased gratuitously,<sup>183</sup> or pays money on a usurious contract, or on a bond *ex turpi causa*.<sup>184</sup> A claim for the balance of the purchase money due to a vendor of land may be proved by him against the estate, like any other debt of the deceased.<sup>185</sup>

Claims of relatives or others for services in support of the decedent, or his relatives or friends, at his request, form valid claims against the estate, unless they were intended to be gratuitous. Thus, where a son expended money in taking care of his mother and her minor children, at the express request of his uncle, it was held that this constituted a valid claim against his uncle's estate.<sup>186</sup> And a statement that the claim is for services in the care and aiding and supporting one is broad enough to include a claim for contributing money to his support.<sup>187</sup> If a married woman, who is capable by the laws of her state of making contracts in her own right, has recognized a liability for medical services rendered to her children, this

<sup>177</sup> *Dawson v. Hemelrick*, 11 S. E. 31, 33 W. Va. 675.

<sup>178</sup> *Smith v. Mayo*, 9 Mass. 62; *Hussey v. Jewett*, Id. 100.

<sup>179</sup> *Ripley v. Sampson*, 10 Pick. (Mass.) 371; *National German-American Bank of St. Paul v. Tapley*, 57 N. W. 1065, 56 Minn. 420.

<sup>180</sup> *Giles v. Dyson*, 1 Starkie, 32; *Shepherd v. Young*, 8 Gray (Mass.) 152.

<sup>181</sup> *Cobb v. Muzzey*, 13 Gray (Mass.) 57.

<sup>182</sup> *Griswold v. Chandler*, 5 N. H. 492.

<sup>183</sup> *Shallcross v. Wright*, 12 Beav. 558.

<sup>184</sup> *Winchcombe v. Bishop of Winchester*, Hob. 167; *Robinson v. Gee*, 1 Ves. Sr. 254.

<sup>185</sup> *Chapman v. Merritt*, 45 Mo. App. 179.

<sup>186</sup> *Grimm v. Taylor*, 55 N. W. 447, 96 Mich. 5.

<sup>187</sup> Id.

claim may be proved against her estate.<sup>188</sup> When the daughter and son of a person entered into a contract whereby the daughter agreed to support her father during his life, but after some years the agreement was rescinded, it was held that the daughter could recover a reasonable sum for such maintenance, notwithstanding the rescinding of the agreement.<sup>189</sup> So, if the deceased had in his life entered into a contract with another for personal services, in return for which he was to devise land to the other, and he fails to do so, the other may have an action against his estate for the value of his services.<sup>190</sup> Claims for personal services similar to the above, such as claims for board, clothes, care in illness, and the like, by one member of a family against the estate of another member of the family, must be decided in each instance upon the facts of the case; the question being whether a valid pecuniary obligation was entered into between the parties by mutual agreement, or whether the services rendered were intended to be gratuitous, and a matter of affection and relationship, and this question is for the jury.<sup>191</sup> If the services were intended to be gratuitous, no payment can be allowed by the executor or administrator. Thus, when a grandmother supported her destitute grandchild, an infant of some two years, and at length the infant was killed in a railroad accident, and her administrator recovered damages therefor, it was held that the grandmother could not recover any portion of these damages because she had gratuitously supported the child, without any expectation of reward, and that no promise of the administrator to pay such claim could bind the estate.<sup>192</sup> The effect of a promise by an executor or administrator to pay a valid debt of the deceased will be considered later.

*Debts Barred by Statute of Limitations.*

Although a debt against the estate of the deceased may have been originally a valid debt of the deceased, yet, if it is barred by

<sup>188</sup> Baker v. Baker, 12 S. E. 346, 87 Va. 180.

<sup>189</sup> Benedict v. Sliter, 31 N. Y. Supp. 413, 82 Hun, 190.

<sup>190</sup> Moore v. Bryant (Tex. Civ. App.) 31 S. W. 223.

<sup>191</sup> Clawson v. Moore, 29 Ill. App. 296; Chapman v. Barnes, Id. 184; Waldron v. Alexander, 24 N. E. 557, 133 Ill. 30; Cridland's Estate, 8 Pa. Co. Ct. R. 6; Sayer's Estate, Id. 32.

<sup>192</sup> Shepherd v. Young, 8 Gray (Mass.) 152; Bomford v. Grimes, 17 Ark. 567. Cf. post, p. 451, c. 22.

the statute of limitations before his death, the executor or administrator must not pay it.<sup>193</sup> The rule at one time in England, and in some of the United States, was that if the debt was justly due the executor or administrator might waive the statute of limitations, and pay the debt, and be allowed for such payment in his account.<sup>194</sup> But the English rule is now changed by statute, and it is there held that if an executor or administrator pays a statute-barred debt after a decree of a court that the debt is barred by the statute, and not recoverable out of the estate, he commits a devastavit.<sup>195</sup> It was held by an eminent judge, in a Massachusetts case, in regard to the retainer by an administrator of a debt due to him by the deceased, but barred by the statute of limitations, that the administrator was barred by the same statute of limitations as a third person would be, thus implying that the administrator could not waive it.<sup>196</sup> Yet in the same state some earlier remarks obiter have seemed to admit a right of the executor or administrator to waive the statute, proceeding on the authority of the case in Atkyn's Reports, above cited.<sup>197</sup>

As to special statutes of limitations of suits against executors or administrators, or special statutes of nonclaim barring claims against the estate which are not presented to the executor or administrator, or sued on within a limited time, the rule is invariable

<sup>193</sup> *In re Kendrick*, 13 N. E. 762, 107 N. Y. 110; *In re Moulllerat's Estate*, 36 Pac. 185, 14 Mont. 245; *Young v. Weed*, 26 Atl. 420, 154 Pa. St. 316; *Dunn's Ex'rs v. Renick*, 10 S. E. 810, 33 W. Va. 476; *Rogers v. Wilson*, 13 Ark. 507; *Rector v. Conway*, 20 Ark. 79; *Grinnell v. Baxter*, 17 Pick. (Mass.) 385; *Moore v. Porcher, Bailey, Eq. (S. C.)* 195; *Dickson v. Compton*, 24 La. Ann. 83. Cf. post, p. 527, c. 24.

<sup>194</sup> *Norton v. Frecker*, 1 Atk. 526; *Scott v. Hancock*, 13 Mass. 164; *Hodgdon v. White*, 11 N. H. 208; *Amoskeag Manuf'g Co. v. Barnes*, 48 N. H. 25, 29; *Ritter's Appeal*, 23 Pa. St. 95; *Payne v. Pusey*, 3 Bush (Ky.) 564; *Chambers v. Fennemore*, 4 Har. (Del.) 368; *Semmes v. Magruder*, 10 Md. 242; *Barnawell v. Smith*, 5 Jones, Eq. (N. C.) 168; *Batson v. Murrell*, 10 Humph. (Tenn.) 301; *Tunstall v. Pollard*, 11 Leigh (Va.) 1; *Woods v. Elliott*, 49 Miss. 168; *Pollard v. Scaers*, 28 Ala. 484; *Kennedy's Appeal*, 4 Pa. St. 149; *Pursel v. Pursel*, 14 N. J. Eq. 526; *Miller v. Dorsey*, 9 Md. 317; *Trimble v. Marshall*, 23 N. W. 645, 66 Iowa, 233; *Leigh v. Smith*, 3 Ired. Eq. (N. C.) 442.

<sup>195</sup> *Midgley v. Midgley*, 2 Reports, 561 [1893] 3 Ch. 282.

<sup>196</sup> *Grinnell v. Baxter*, 17 Pick. 385.

<sup>197</sup> *Scott v. Hancock*, 13 Mass. 164; *Emerson v. Thompson*, 16 Mass. 431.



that the executor or administrator cannot waive the bar of these statutes, but must refuse to pay the claim if it is barred by the statute. And if he does pay the claim his payment will not be allowed him in his account.<sup>198</sup>

As to debts owing to the executor or administrator himself by the estate, a claim which is barred by the general statute of limitations will not be allowed to him.<sup>199</sup> But a difference of decisions exists as to the special statutes of limitations, based upon a difference of procedure as to the presentation of claims for allowance. In states where the statute requires claims to be presented or passed upon by the court within a certain time, upon the penalty of being barred, a claim of the executor or administrator which is not presented to the court for allowance will be barred, like a claim of a third person.<sup>200</sup> And in general, if the allowance of claims depends upon the acts of any third person within the limited time, or upon any formal act or record of the executor or administrator within that time, the claim will be barred if the act is not done; but where there is no formal presentment of claims required, but merely a statute which provides that suit shall not be brought against the executor or administrator unless it is begun within a certain limited time, the executor or administrator is not prevented by that statute from claiming in his accounts, at any time when they are presented, any debt that is due to him from the estate.<sup>201</sup> This rule, however, does not apply to claims which he has bought from a third person, and these will be barred in the usual manner.<sup>202</sup>

*Debts Due to the Executor or Administrator.*

At common law an executor or administrator was entitled to retain his own debt out of the estate, in priority to any of the same

<sup>198</sup> *Scott v. Hancock*, 13 Mass. 162; *Lamson v. Schutt*, 4 Allen (Mass.) 360; *Walker v. Cheever*, 39 N. H. 428; *Wiggins v. Lovering's Adm'r*, 9 Mo. 262; *Ames v. Jackson*, 115 Mass. 510; *Dickinson v. Arms*, 8 Pick. (Mass.) 394; *Hodgdon v. White*, 11 N. H. 208, 216; *Stillman v. Young*, 16 Ill. 318. Cf. post, p. 528, c. 24.

<sup>199</sup> *Cann v. Cann*, 20 S. E. 910, 40 W. Va. 138.

<sup>200</sup> *In re Villee's Estate*, 2 Pa. Dist. R. 74.

<sup>201</sup> *Ames v. Jackson*, 115 Mass. 510; *Munroe v. Holmes*, 13 Allen (Mass.) 109.

<sup>202</sup> *In re Robbins' Estate*, 27 N. Y. Supp. 1009, 7 Misc. Rep. 264.

class.<sup>203</sup> This right of retainer has been very substantially modified by statute in the United States, and generally now the executor or administrator is entitled only to his pro rata share of the assets, if there is not enough to pay all.<sup>204</sup> And, if any rules exist as to presentation of claims by creditors to the court for allowance, he must submit to the same rules as other creditors, and must account for his claim in his account in the same way as for other payments.<sup>205</sup> In many states, however, the executor or administrator is not required to file his claim as other creditors must,<sup>206</sup> unless his claim is disputed, while in others his course of procedure is regulated by statutes relating to the filing of his claim in the probate court in the proceedings to settle the estate.<sup>207</sup> Under a statute which gives the court power to allow or reject the claim of an executor or administrator against the estate, the court may pass upon the claim, when it is brought forward by the administrator of a deceased executor against the estate of which he was executor.<sup>208</sup> If the statute requires claims to be verified by affidavit, an executor or administrator must so verify his claim, although by another statute he is rendered incompetent to testify to any transactions with the deceased.<sup>209</sup> Under a statute allowing proof of claims owned by an executor or administrator, only a claim owned by him solely can be proved, and a debt which is due to a partnership of which he is a member cannot be proved.<sup>210</sup>

<sup>203</sup> 2 Bl.Comm. 511; *Dolman v. Cook*, 14 N. J. Eq. 56.

<sup>204</sup> *Green v. Russell*, 132 Mass. 540; *Smith's Adm'r v. Bryant's Adm'r*, 60 Ala. 235; *Jenkins v. Jenkins*, 63 Ind. 120; *Stevenson v. Schriver*, 9 Gill & J. (Md.) 324.

<sup>205</sup> *Green v. Russell*, 132 Mass. 540. See statutes passim.

<sup>206</sup> *Sanderson's Adm'rs v. Sanderson*, 17 Fla. 821; *French v. Winsor*, 24 Vt. 402; *Miller v. Irby's Adm'r*, 63 Ala. 477.

<sup>207</sup> *Bentley v. Brown*, 24 N. E. 507, 123 Ind. 552; *Riley v. McInlear's Estate*, 17 Atl. 729, 61 Vt. 254; *Newell v. West*, 21 N. E. 954, 149 Mass. 520; *McLaughlin v. Newton*, 53 N. H. 531; *Barras v. Barras*, 4 Redf. Sur. (N. Y.) 263; *Keller v. Stuck*, 4 Redf. Sur. (N. Y.) 294; *Gardner's Case*, 5 Redf. Sur. (N. Y.) 14; *Kearney v. McKeon*, 85 N. Y. 136; *Wright v. Wright*, 72 Ind. 149; *Crosby's Estate*, 55 Cal. 574; *Tuttle v. Robinson*, 33 N. H. 104; *Watson v. Watson*, 58 Md. 442; Md. Rev. Code, art. 50, §§ 163, 164.

<sup>208</sup> *In re Cooper*, 27 N. Y. Supp. 425, 6 Misc. Rep. 501.

<sup>209</sup> *In re Childs*, 26 N. Y. Supp. 721, 5 Misc. Rep. 560.

<sup>210</sup> *In re Jones' Estate*, 23 N. Y. Supp. 767, 2 Misc. Rep. 221.

If the statute postpones the time at which an executor or administrator may deduct his debt from the estate till the settlement of his account, he is entitled at such settlement to charge interest on his claim.<sup>211</sup> Under such a statute he cannot be allowed to prove his claim in an isolated proceeding brought solely for that purpose, but must prove it at the settlement of his probate account.<sup>212</sup> If the statute requires his claim to be presented to the court for acceptance or rejection, he is, of course, barred from passing upon his own claim, although he has the right to accept or reject others.<sup>213</sup> The fact that, when the executor or administrator has a claim against the estate, the debtor and creditor are both one person, does not extinguish the claim.<sup>214</sup> If his claim is rejected by the court, and he wishes to enforce his claim against the estate by suit, it has been held that he must resign, and sue as a stranger.<sup>215</sup> If a corporation which is by its charter duly authorized to act as executor or administrator, while acting in such capacity, has occasion to prove a claim due to its decedent against the estate of another decedent, it may do so, under a statute allowing any "person" to prove claims, and giving a form of affidavit for "executors, administrators, assignees, and officers of corporations." And it is a sufficient allegation that the debt is due to the estate of its decedent, instead of to itself.<sup>216</sup> The fact that one has proved the will and qualified as administrator de bonis non does not prevent him from claiming part of the property as his own, if the will does not specify this property as belonging to the estate.<sup>217</sup> Nor will the fact that he claims as his own part of a fund which he holds, but treats as assets of the estate, prevent him from recovering as a creditor the amount which he claims.<sup>218</sup> If an executor or administrator advances money to pay debts of the estate, he is entitled to be refunded out of the proceeds of sale of lands

<sup>211</sup> *In re Saunders' Estate*, 23 N. Y. Supp. 829, 4 Misc. Rep. 28.

<sup>212</sup> *In re Ryder*, 29 N. E. 309, 129 N. Y. 640.

<sup>213</sup> *Estate of Hildebrandt*, 28 Pac. 486, 92 Cal. 433.

<sup>214</sup> *Deans v. Wilcox*, 7 South. 163, 25 Fla. 980.

<sup>215</sup> *Wilkins v. Wilkins*, 23 Pac. 411, 1 Wash. St. 87.

<sup>216</sup> *Fidelity Ins., Trust & Safe-Deposit Co. v. Niven*, 6 Houst. (Del.) 64.

<sup>217</sup> *Lucas v. Cooper* (Ky.) 23 S. W. 959.

<sup>218</sup> *Buckley v. Buckley*, 32 N. E. 863, 157 Mass. 536.

of the estate which are subject to these debts.<sup>219</sup> If an executor or administrator advances money to pay claims which are a lien on land, and by statute the lien is lost, unless action is commenced thereon in a limited time, and the executor or administrator fails to take such action, the lien on the land is lost, and the executor cannot be allowed for the payment in his accounts.<sup>220</sup> The executor or administrator cannot, in order to defraud distributees and get the whole estate for the widow, file a fraudulent claim in his own favor, covering all the assets of the estate.<sup>221</sup> The effect of the statute of limitations upon the claims of the executor or administrator against the estate was considered in a previous paragraph.<sup>222</sup>

#### PRESENTATION AND ALLOWANCE OF CLAIMS.

141. Claims against the estate must be presented to the executor or administrator for allowance and payment. In some states, by statute, this presentation must be within a limited time, or the claims are barred.
142. If the claim is rejected by the executor or administrator, it may be sued upon either in the probate court, or in the common-law court, as the statutes may prescribe. In many states the action must be commenced within a limited time, either from the rejection of the claim, or from the notice of appointment of the executor or administrator, or it will be barred.
143. Claims to become due at a future date without contingency may, by statute, generally be proved, and funds reserved to meet them. Claims contingently due in future are in some states, by statute, provable; in others, not.

The procedure for the presentation of claims against the estate, and actions to enforce payment thereof, vary so widely in the dif-

<sup>219</sup> Doty v. Cox (Ky.) 22 S. W. 321.

<sup>220</sup> Merkel's Estate, 26 Atl. 428, 154 Pa. St. 285.

<sup>221</sup> Clancey v. Clancey (N. M.) 37 Pac. 1105.

<sup>222</sup> See ante, p. 333.

ferent states that the statutes of each state furnish the only safe guide in each instance. There are several important features, which are common to all the systems, which may be examined with some detail.

In many states no formal presentation of claims to the executor or administrator is required. A creditor may, if he chooses, bring suit at any time without demand, provided it is within the special statute of limitations, i e. within a limited time from the public notice given by the executor or administrator of his appointment. In most states, however, claims are required to be presented formally to the executor or administrator for payment, and his allowance or rejection is a formal act, which gives the right to sue thereon within a limited time, either at common law or in the probate court, although in some states an appeal may be had to the probate court from the decision of the executor or administrator.

Claims must be presented for allowance to the executor or administrator, or to the probate court, as the statutes may direct.<sup>223</sup> In making the statement or the presentation of the claim to the executor or administrator, it is not generally necessary to follow any formal method of statement, unless such is prescribed by statute. Any statement which gives the amount and nature of the claim with sufficient precision to prevent a subsequent claim for the same debt will be enough.<sup>224</sup> But a verbal statement is not enough generally, and certainly not when the statute requires it to be in writing.<sup>225</sup> If the statute requires an affidavit to support the claim, it must be so verified.<sup>226</sup> If a claim is by statute to be supported by an affidavit of its validity, and also of the fact that no payment has been made on it, an affidavit which omits the latter statement is insufficient.<sup>227</sup> But it has been held that an affidavit that the amount set out "is now justly due and owing to the affiant, after making all proper de-

<sup>223</sup> *Corey v. Gillespie* (Iowa) 62 N. W. 837; *Niles v. Crocker*, 34 N. Y. Supp. 761, 88 Hun. 312.

<sup>224</sup> *Doan v. Dow*, 35 N. E. 709, 8 Ind. App. 324; *Parrett v. Palmer*, 35 N. E. 713, 8 Ind. App. 356; *Corr's Appeal from Com'rs*, 26 Atl. 478, 62 Conn. 403; *Wood v. Land*, 35 Mo. App. 381.

<sup>225</sup> *Matter of Morton's Estate*, 28 N. Y. Supp. 82, 7 Misc. Rep. 343.

<sup>226</sup> *Worley v. Hineman* (Ind. App.) 29 N. E. 570.

<sup>227</sup> *Matter of Clapsaddle's Estate*, 24 N. Y. Supp. 313, 4 Misc. Rep. 355.

ductions," is sufficient under a statute which requires the affiant to "set forth all credits and deductions to which the estate is entitled," and to state that the claim, after making such deductions, is "justly due and wholly unpaid."<sup>228</sup> Presentation to one of several executors or administrators is sufficient.<sup>229</sup> If the executor's or administrator's notice requiring claims to be presented specifies the office of a certain attorney as the place for presenting them, it is sufficient if a statement of the claim in writing is left at the attorney's office.<sup>230</sup> If the statute merely requires exhibition of the claim, and demand of payment, it is enough if the executor or administrator knows the nature and amount of the claim, and it is called to his mind and payment demanded within the time limited.<sup>231</sup> If the statute requires the executor's notice to state that claims must be presented to him at his "place of residence or transaction of business, to be specified thereon," the notice need not specify whether the place is the residence or the place of transacting business.<sup>232</sup>

#### *Suit on Rejected Claims.*

If the claim, when it is presented to the executor or administrator, is rejected by him, or by the court, as the statute may provide, the statutes generally allow the claimant to sue upon it, though in some states at common law, and in others in the probate court. Such actions are discussed later, in treating of actions against executors and administrators.<sup>233</sup> As far as a writ of review of such a rejection is concerned, the decree rejecting the claim begins the lapse of time within which, by statute, the suit must be brought.<sup>234</sup> The rejection of a claim by an attorney of an executor or administrator is sufficient rejection to base a suit upon.<sup>235</sup> If a claim is allowed by the executor or administrator, and approved by the court, and a petition by one interested in the estate to have it disallowed

<sup>228</sup> *Brown v. Sullivan*, 29 N. E. 453, 3 Ind. App. 211. Cf. *Wolfe v. Wilsey*, 28 N. E. 1004, 2 Ind. App. 549.

<sup>229</sup> *Barnes v. Scott*, 11 South. 48, 29 Fla. 285. Cf. ante, p. 174, c. 11.

<sup>230</sup> *Roddan v. Doane*, 28 Pac. 604, 92 Cal. 555.

<sup>231</sup> *Ayer v. Chadwick*, 23 Atl. 428, 66 N. H. 385.

<sup>232</sup> *Douglass v. Folsom*, 33 Pac. 660, 21 Nev. 441.

<sup>233</sup> See post, p. 468, c. 23.

<sup>234</sup> *Schooley's Estate*, 7 Kulp (Pa.) 226.

<sup>235</sup> *Wintermeyer v. Sherwood*, 28 N. Y. Supp. 449, 77 Hun, 193.

is denied, this is conclusive between the parties of the validity of the claim.<sup>236</sup> If the presentation of the claim to the executor or administrator or to the court is made by statute a condition precedent to suit, a lack of such presentation will be a good defense to the suit, and will justify a reversal of the judgment.<sup>237</sup> The fact that the administrator promised to pay one claim, and asked the claimant not to file it, will not excuse a failure to file another claim, of which the administrator had no knowledge.<sup>238</sup>

*Limitations on Time of Presenting Claims.*

Generally the time within which claims may be presented to the executor or administrator for allowance is also limited, the period being some reasonable length of time after the executor or administrator publishes the notice of his appointment requesting claims to be presented to him for payment. Claims which are not presented and filed, if the statute so prescribed, within the limited time, are barred from being proved against the estate, unless the statute provides some relief, in the way of extending the time, or otherwise, upon showing that the failure was not due to the default of the person owning the claim.<sup>239</sup> Where by statute an executor or administrator takes the rents and profits of the real estate, a claim made by a third party for such rents and profits is not barred, though not filed within the time limited, if the right of the third party to the land was not settled till after that time had expired, if the statute allows equitable relief for claims barred under "peculiar circumstances."<sup>240</sup> It is held that if a creditor in the state in which principal administration is granted fails to file his claim within the time required by the statute, and is thus barred, the claim cannot be allowed in another jurisdiction where there is property, and where

<sup>236</sup> Snelling v. Kroger, 56 N. W. 446, 89 Iowa, 247.

<sup>237</sup> Steen v. Hendy (Cal.) 40 Pac. 21; In re Kessler's Estate, 59 N. W. 129, 87 Wis. 66; Grant v. Grant, 29 Atl. 15, 63 Conn. 530; Matter of Morton's Estate, 28 N. Y. Supp. 82, 7 Misc. 343; Stults v. Forst (Ind. App.) 34 N. E. 1125; Verdier v. Roach, 31 Pac. 354, 96 Cal. 467.

<sup>238</sup> Manning v. Stout (Iowa) 61 N. W. 963.

<sup>239</sup> Metz v. People, 40 Pac. 51, 6 Colo. App. 57; Manning v. Stout (Iowa) 61 N. W. 963; Pearson v. Christman (Iowa) 61 N. W. 1085; Snyderacker v. Cattle Co., 40 N. E. 466, 154 Ill. 220, reversing 51 Ill. App. 211.

<sup>240</sup> Senat v. Findley, 50 N. W. 575, 51 Iowa, 20. See, also, Ury v. Bush, 52 N. W. 666, 85 Iowa, 698.

the time limit for filing claims is more extended.<sup>241</sup> Nor, if he proves in one state, and gets judgment, can he prove in another state after the time limit has elapsed.<sup>242</sup> Although a claim may be barred so that it cannot be enforced against the executor or administrator, yet, if it is secured by a mortgage, it may be enforced against the security, by sale or otherwise, as allowed by the mortgage or by law.<sup>243</sup> After a claim has been barred against the executor or administrator, it may in some states be prosecuted against the heirs, legatees, or devisees, according to the assets received by them from the estate.<sup>244</sup> If a claim is barred by the failure to present it within the time allowed by the statute, or by the notice fixed by the court, the claim cannot be set off in an action by the executor or administrator against the claimant.<sup>245</sup> In some states, by statute, a presentation of the claim to the executor or administrator in due form, and having it enrolled among the debts of the estate, will prevent the further running of the general statute of limitations.<sup>246</sup> No limit of time will bar a claim brought against the estate for specific trust funds held by the decedent,<sup>247</sup> or to enforce the trust.<sup>248</sup> The fact that a creditor fails to present a claim, and allows it to become barred, is no evidence, in a collateral action, that he thought his claim was groundless or defective in any way.<sup>249</sup> If the beginning of the time limited for presenting claims is the publication of the executor's or administrator's notice of appointment, and the notice is not published, the time will not begin to run, and claims are not barred for want of filing.<sup>250</sup> The publication of notice does not affect the running of the general statute of limitations in any way.<sup>251</sup>

<sup>241</sup> *Durston v. Pollock*, 60 N. W. 221, 91 Iowa, 668.

<sup>242</sup> *Turner v. Risor*, 15 S. W. 13, 54 Ark. 33.

<sup>243</sup> *Reid v. Sullivan*, 39 Pac. 338, 20 Colo. 498. Cf. ante, p. 326.

<sup>244</sup> *Hantzsch v. Massolt*, 63 N. W. 1069, 61 Minn. 361.

<sup>245</sup> *Quinn v. McGovern*, 56 N. W. 226, 97 Mich. 114. Cf. post, p. 541, c. 24.

<sup>246</sup> *Allen v. Hillman*, 13 South. 871, 69 Miss. 225. See, also, post, p. 527, c. 24.

<sup>247</sup> *Smith v. Combs*, 24 Atl. 9, 49 N. J. Eq. 420; *Biron v. Scott*, 49 N. W. 747, 80 Wis. 206.

<sup>248</sup> *Tyler v. Mayre*, 27 Pac. 160, 30 Pac. 196, and 95 Cal. 160.

<sup>249</sup> *Johnston v. Derr*, 14 S. E. 641, 110 N. C. 1.

<sup>250</sup> *Bradley v. Kent*, 32 Atl. 286, 7 Houst. 372.

<sup>251</sup> *McMillan v. Hayward*, 29 Pac. 774, 94 Cal. 357. Cf. post, p. 540, c. 24.



*Debts not Due or Contingent.*

A debt which is not due at the time of proving claims, but is payable absolutely at a definite time in the future, may be proved as a claim against the estate, and funds retained to meet it.<sup>252</sup>

There is often a statutory provision by which claims which are not absolutely due, but which may become due on a contingency in the future, may be presented before the time limit has expired, and a sufficient fund retained to pay them when they may become due.<sup>253</sup> A claim against the estate of a deceased stockholder in a corporation, for contribution on account of unpaid stock held by him, is a contingent claim, under such a statute, as long as the assets of the corporation are not fully distributed, for until then it is uncertain whether they may not satisfy the claim.<sup>254</sup> If the statute allows claims which do not "accrue" within the limited time to be presented at any time before the estate is fully administered, a claim, by the executrix of a ward against the administrators of a guardian for a balance due the ward on a final account of the guardian, which was not allowed by the probate court till after the limited time had elapsed, may be proved before the guardian's estate is finally administered.<sup>255</sup> When the statute provides that, if the claim does not accrue till after the death of the deceased, it shall be presented within four months after the claim accrues, the time does not begin to run till there is an administrator appointed to whom the claim may be presented.<sup>256</sup> And a statute which provides that claims shall be presented within a certain time has been held not to apply to a contingent claim which did not become due till after the expiration of that time.<sup>257</sup>

<sup>252</sup> *Empire Pav. & Const. Co. v. Prather's Adm'r*, 58 Mo. App. 487.

<sup>253</sup> *Oswald v. Pillsbury*, 63 N. W. 1072, 61 Minn. 520; *Austin v. Saveland's Estate*, 45 N. W. 955, 77 Wis. 108.

<sup>254</sup> *Hospes v. Car Co.*, 50 N. W. 1117, 48 Minn. 174.

<sup>255</sup> *Cobb v. Kempton*, 28 N. E. 264, 154 Mass. 266.

<sup>256</sup> *Gay's Appeal*, 23 Atl. 829, 61 Conn. 445.

<sup>257</sup> *Morgan v. Gibson*, 42 Mo. App. 234.

## INSOLVENT ESTATES.

144. If the assets of the estate, including the proceeds of the sale of real estate, are not enough to pay all valid legal debts and charges, in full, the estate is insolvent.
145. If the estate is insolvent, debts will be paid in the order of priority established by law as before stated. Whether or not an estate is insolvent is determined as soon as the debts allowed exceed the assets. Whether or not an estate is insolvent will generally be determined upon the amount of assets and debts proved in the jurisdiction determining the question.
146. Proceedings are regulated by statutes, but generally follow the rules and principles of insolvency courts.

In pursuance of the general plan which is adopted in the United States, of gathering in all claims against an estate, and paying them all at the same time, so far as may be, and in the same proportion, if the assets are not enough for all there are enacted in most states statutes which exempt an executor or administrator from liability to suit for a given time, in order that he may have an opportunity to collect the claims against the estate, and get an idea of whether the estate is solvent or not. In other states the same effect is produced by not allowing claims to be proved in the probate court until they have been rejected by the executor or administrator. The executor or administrator, having thus collected the assets and the claims against the estate, may decide whether or not the estate is insolvent. As soon as the debts which the executor or administrator recognizes as valid exceed the assets which he has in possession or control, the estate is insolvent, and must be treated as such. Often this question cannot be determined until the time for filing claims has expired; for, although the assets may seem sufficient up to the time, yet at the last moment claims may be filed which will render

the estate insolvent.<sup>258</sup> The question of whether or not an estate is insolvent, when there are assets in several jurisdictions, and ancillary administrations, is one of some difficulty. The safest rule would seem to be that each jurisdiction should decide the question upon the debts proved before it, and the assets in its hands.<sup>259</sup> In deciding whether or not the estate is insolvent, only valid claims can be considered. Thus, debts barred by the statute of limitations must be rejected.<sup>260</sup>

The procedure in cases of insolvent estates varies in different states. In those which have, as before seen, a regular system of proving claims and registering them in court, there is little difference in procedure of solvent and insolvent estates. In those states, however, where solvent estates are settled entirely out of court, except so far as accounting is concerned, the insolvency of the estate makes a great difference of procedure, and throws the whole estate into court. The main features, however, of these statutes are similar,<sup>261</sup> and provide that when it appears to the probate court, from the representations of an executor or administrator, that the estate of the deceased will probably be insufficient for the payment of his debts, the court may appoint commissioners to receive and examine all claims of creditors against the estate, and to return a list of all claims laid before them, and the sum allowed on each. In some states the court itself performs this duty. These commissioners appoint times and places for meeting to prove claims, and give notice thereof to all known creditors, being furnished with a list of them by the executor or administrator, and, after receiving all claims presented during the time allowed for the proof of claims, make a return to the court. All creditors not presenting their claims are barred except as to new assets.

Any person whose claim is wholly or partially disallowed, or any executor, administrator, heir, legatee, devisee, or creditor who is dissatisfied with the allowance of a claim, may appeal. The allowance

<sup>258</sup> *In re Higgins' Estate*, 39 Pac. 506, 15 Mont. 474; *Barber v. Collins*, 30 Atl. 796, 18 R. I. 760; *Johnston v. Superior Court*, 39 Pac. 36, 105 Cal. 666. But the administrator may see immediately upon his appointment that the estate is insolvent, and may at once so report it. *Hullett v. Hood* (Ala.) 19 South. 419.

<sup>259</sup> See ante, p. 151, c. 10.

<sup>260</sup> *Haby v. Fuos* (Tex. Civ. App.) 25 S. W. 1121. <sup>261</sup> See statutes passim.

of a claim by the commissioners or the court, if not appealed from, binds the estate, and furnishes the rule for the distribution.<sup>262</sup>

After the expiration of the time allowed for appeals, the probate court makes a decree of distribution, making allowance for appeals pending, so as to retain enough to pay the appellants a proportionate sum equal to the dividends of other creditors. The estate is to be distributed as is provided by the statutes relating to insolvent debtors. It is also generally provided by statute that if, at the expiration of the time for proving claims, a person is liable as surety for the deceased, or has any other contingent claim against his estate which could not be proved as a debt within that time, the court shall, upon proof of those facts, in ordering a dividend, leave in the hands of the executor or administrator a sum sufficient to pay such contingent creditor a proportion equal to what is then to be paid to other creditors; and, if the claim becomes absolute within a limited time, it may be proved and allowed by the commissioners, and paid in the same proportion as the other claims, so far as this can be done without disturbing the former dividend. If the claim is not established, or if a surplus of assets remains after paying it in proportion to the other dividends, the residue is to be divided among all creditors who have proved their debts. If a suit is pending, a representation of insolvency should be made previous to judgment; for, if the executor or administrator allows the suit to progress to judgment without denying that he has assets sufficient to satisfy the judgment, he is considered to have admitted such assets,<sup>263</sup> and the mere fact that the estate is insolvent does not interfere with any action until proceedings are actually begun in the probate court under the statutes.<sup>264</sup> In those states where, as has been already seen, a statute provides for a notice to creditors to exhibit their claims within a certain time, an executor or administrator may, after obtaining such an order, represent the estate insolvent.<sup>265</sup> If an executor or administrator seasonably represents that the estate is insolvent, he protects himself from any personal liability on claims

<sup>262</sup> *Shelton v. Hadlock*, 25 Atl. 483, 62 Conn. 143; *Barber v. Bowen*, 49 N. W. 684, 47 Minn. 118.

<sup>263</sup> *Newcomb v. Goss*, 1 Metc. (Mass.) 333; *Thurlough v. Kendall*, 62 Me. 167.

<sup>264</sup> *Dibble v. Woodhull's Ex'r*, 24 N. J. Law, 618.

<sup>265</sup> *Von Arx v. Wemple*, 43 N. J. Law, 154.

against the estate, even on scire facias to fix a personal liability on him.<sup>266</sup> Under such statutes it is held that these proceedings are a complete bar to any creditor who has not proved his claim under them, unless the statute provides for further dividends if further assets accrue to the estate.<sup>267</sup> In New Jersey this rule extends even to preferred creditors, who are required to establish their claims under oath, or be barred.<sup>268</sup> In other states the insolvency proceedings are held to apply only to common creditors.<sup>269</sup> In Pennsylvania, where the commonwealth's debts are paid last, the insolvent proceedings apply to such claims.<sup>270</sup> The limitation of time is generally construed strictly. No claim filed after it has expired can be allowed.<sup>271</sup>

In those states where the statute provides that, if new assets accrue to the estate, a creditor not originally proving in insolvency may follow them, the decision of the judge of probate that new assets have accrued to the estate is conclusive of this question, except upon a direct appeal from his decision. It is too late to raise this question upon an appeal from the commissioners' decision allowing a creditor's claim, under a reopened commission.<sup>272</sup> In any case, when the estate is sufficient to satisfy more than the preferred claims, the executor or administrator must declare the estate insolvent, if he wishes to be protected from paying the other debts;<sup>273</sup> and if he pays a debt (not preferred) in full, when the estate is insolvent, he is liable personally to the other creditors for the amount so paid.<sup>274</sup>

*What Claims are Provable.*

As to what claims in particular may be proved against the insolvent estate, it may be said that debts which are certainly due, but

<sup>266</sup> Barber v. Collins, 30 Atl. 796, 18 R. I. 760.

<sup>267</sup> Ostrom v. Curtis, 1 Cush. (Mass.) 467; N. J. Revision, "Orphans' Court," p. 773, § 94; Vandyke v. Chandler, 10 N. J. Law, 49.

<sup>268</sup> Fogg's Case, 37 N. J. Eq. 238.

<sup>269</sup> Mass. Pub. St. c. 136, § 1; National Bank of Troy v. Stanton, 116 Mass. 439; State v. Hichborn, 67 Me. 504; Flitner v. Hanley, 19 Me. 261; McLean v. Weeks, 65 Me. 411.

<sup>270</sup> In re Mitchell's Estate, 2 Watts, 87.

<sup>271</sup> Gould v. Tingley, 16 N. J. Eq. 501.

<sup>272</sup> Ostrom v. Curtis, 1 Cush. (Mass.) 467.

<sup>273</sup> Ludwig v. Blackinton, 24 Me. 25.

<sup>274</sup> Cobb v. Muzzey, 13 Gray (Mass.) 58.

at a future day, have always been held provable,<sup>275</sup> even though they may be payable in installments.<sup>276</sup> Contingent liabilities are provided for by statute generally, as is above shown. In the absence of such a statute, it has been held that a contingent liability is not provable against the estate.<sup>277</sup> A liability as surety on a promissory note is held not to be a contingent liability, nor is an uncertainty whether or not, as a question of law, a debt is justly due, sufficient to allow the creditor to prove under this statute, and await the end of a lawsuit to determine the question. It is only a valid claim which depends upon a contingency, and which the creditors cannot reduce to a certain claim by a payment of money, that is within this statute.<sup>278</sup> Debts which are contracted subsequent to the death of a partner, by the other partner, carrying on the business under an agreement made between them that if one should die the other might carry on the business, are not provable against the insolvent estate of the deceased partner.<sup>279</sup> If a wife mortgages her separate estate to secure a debt of her husband, and pays the debt after his death to exonerate her estate, she is entitled to prove the debt.<sup>280</sup>

As to a creditor holding security given to him by the debtor, he can only prove for the surplus of his debts over the value of the security, unless he surrenders the security;<sup>281</sup> but if the security is given by a third person, not the debtor,—for example, by the debtor's wife,—the creditors may prove for the whole claim.<sup>282</sup> If a mortgage is given by a debtor who holds the record title, although he has previously conveyed to another, yet the mortgage is furnished by the

<sup>275</sup> *Eaton v. Whitaker*, 6 Pick. (Mass.) 465; *Trustees of Haverhill Loan & Fund Ass'n v. Cronin*, 4 Allen (Mass.) 141; N. Y. 3 Rev. St. p. 2299, § 29 (with a rebate of interest).

<sup>276</sup> *Trustees of Haverhill Loan & Fund Ass'n v. Cronin*, 4 Allen (Mass.) 141.

<sup>277</sup> *Harding v. Smith*, 11 Pick. (Mass.) 478. Cf. post, p. 347.

<sup>278</sup> *French v. Hayward*, 16 Gray (Mass.) 513; *Cummings v. Thompson*, 7 Metc. (Mass.) 132; *Sears v. Wills*, 7 Allen (Mass.) 430; *Greene v. Dyer*, 32 Me. 460.

<sup>279</sup> *Stanwood v. Owen*, 14 Gray (Mass.) 199.

<sup>280</sup> *Savage v. Winchester*, 15 Gray (Mass.) 454.

<sup>281</sup> *Amory v. Francis*, 16 Mass. 308.

<sup>282</sup> *Savage v. Winchester*, 15 Gray (Mass.) 454.

debtor, and the creditor must surrender, or prove only for the surplus.<sup>283</sup>

Rent due at any time before the commission is closed may be proved, but not a claim for rent which may become due under a lease after that time, if the executor or administrator chooses to continue under the lease.<sup>284</sup> And now, by statute, in most states, rent may be apportioned so that the rent due up to the date of the death of the deceased may be, in any case, recovered.<sup>285</sup> Interest should be allowed on debts up to the time of the decree of distribution, as against the heirs and legatees.<sup>286</sup> It seems that in Massachusetts the only debts which can be proved are legal claims, as distinguished from equitable.<sup>287</sup>

### *Statute of Limitations.*

As a general rule, the statutes of limitations are not suspended by the provisions of the insolvent estates statutes, but continue to run against the creditors.<sup>288</sup> But there is one exception; that is, that, as to any creditor who has not proved his claim in these proceedings, the statute of limitations does not apply if new assets accrue to the estate, for until new assets accrue he is unable to sue on his claim, and when the new assets do accrue he may proceed, in the manner prescribed by the statute, in the probate court, regardless of the statute of limitations,—so far only, however, as these new assets are concerned.<sup>289</sup> A proceeding in insolvency is not a proceeding which can be removed to the United States circuit court under act of congress.<sup>290</sup>

### *What Fund Liable.*

In payment of debts, the fund which is primarily responsible is the personal property, and secondarily the real estate, under the

<sup>283</sup> Bristol County Sav. Bank v. Woodward, 137 Mass. 412.

<sup>284</sup> Deane v. Caldwell, 127 Mass. 246.

<sup>285</sup> Mass. Pub. St. c. 121, § 8; N. Y. 3 Rev. St. (7th Ed.) p. 2302; Laws 1875, c. 542.

<sup>286</sup> Williams v. Bank, 4 Metc. (Mass.) 320; Dodge v. Breed, 13 Mass. 537.

<sup>287</sup> Deane v. Caldwell, 127 Mass. 246.

<sup>288</sup> Blanchard v. Allen, 116 Mass. 449; Aiken v. Morse, 104 Mass. 282.

<sup>289</sup> Ostrom v. Curtis, 1 Cush. (Mass.) 467; Aiken v. Morse, 104 Mass. 282.

<sup>290</sup> U. S. Act 1867, c. 196 (14 Stat. 558); Du Vivier v. Hopkins, 116 Mass. 125.

power given to the executor or administrator by statute.<sup>291</sup> But in cases of testacy the testator may, by his will, vary the liability for debts by exempting one portion of his property, and charging another.<sup>292</sup>

*Insolvent Partnership Estates.*

If the claims of partnership creditors, together with those of the separate creditors, make up a sum greater than the total assets of an estate, including the share of the partnership assets which belongs to the estate, each class of claims must be primarily remitted to its own class for payment, and can come upon the other only after the latter debts have been satisfied.<sup>293</sup> This rule arises from the fact that the separate creditors of the deceased have no claims upon the assets of the estate until all the firm debts are paid, since the only assets of the estate of the deceased arising from the partnership funds are the surplus of such funds over partnership debts.<sup>294</sup> And, conversely, the partnership debts are to be satisfied out of partnership assets, and can only come upon the separate estate after the separate creditors have been satisfied in accordance with the established bankruptcy laws.<sup>295</sup> Thus, in settling an insolvent estate of a deceased partner, if both individual and co-partnership claims are proved against the estate two lists of claims are made and the partnership estate is distributed among the partnership creditors, and the separate estate among the separate creditors.<sup>296</sup> If the deceased partner owed the firm, and his estate is insolvent, as well as the surviving partner, the estate is liable to make good the amount which the deceased partner equitably owed the living partner as an individual. This is one-half (if the shares

<sup>291</sup> *Hays v. Jackson*, 6 Mass. 149; *Ex parte Lee*, 18 Pick. (Mass.) 293.

<sup>292</sup> *Ex parte Lee*, 18 Pick. (Mass.) 288. See Abb. Desc. Wills & Adm. §§ 152-155.

<sup>293</sup> *Burnside v. Merrick*, 4 Metc. (Mass.) 542; *Black's Appeal*, 44 Pa. St. 503; *McCormick's Appeal*, 55 Pa. St. 252; *D'Inwilliers' Estate*, 8 Wkly. Notes Cas. 455.

<sup>294</sup> *Lindl. Partn.* 599; *Burnside v. Merrick*, 4 Metc. (Mass.) 542.

<sup>295</sup> *Lindl. Partn.* 598, 599; *Bush v. Clark*, 127 Mass. 111; *Burnside v. Merrick*, 7 Metc. (Mass.) 542; *Harris v. Peabody*, 73 Me. 262; *Davis v. Howell*, 33 N. J. Eq. 72; *Hartman's Appeal*, 107 Pa. St. 327; *Doggett v. Dill*, 108 Ill. 560.

<sup>296</sup> *Bush v. Clark*, 127 Mass. 113; *Burnside v. Merrick*, 4 Metc. (Mass.) 542.



of each partner in the partnership are equal) of what he owed the firm; that is, the living partner comes in as an individual creditor of the estate. To this extent only can the surviving partner or his creditors reach the individual assets of the estate.<sup>297</sup> When, however, there is no joint or partnership estate at the death of the partner, and there is no solvent partner, it is held that the firm creditors may come in equally with the separate creditors against the separate estate.<sup>298</sup>

<sup>297</sup> McCormick's Appeal, 55 Pa. St. 255.

<sup>298</sup> Harris v. Peabody, 73 Me. 262; Lindl. Partn. 599; Sperry's Estate, 1 Ashm. (Pa.) 347.

**CHAPTER XVIII.****PAYMENT OF LEGACIES.**

- 147-149. Legacies Subordinate to Debts.
- 150. Legacy as Satisfaction of Debt.
- 151. Set-Off of Legacy and Debt.
- 152-153. Priority between Legacies and Contingent, Future, or Unknown Debts.
- 154. Abatement of Legacies.
- 155-157. Assent of Executor to Legacy.
- 158. Time of Payment of Legacies.
- 159. To Whom a Legacy is to be Paid.
- 160-162. Profits and Interest on Legacy.

**LEGACIES SUBORDINATE TO DEBTS.**

- 147. The duties of an executor after the payment of the debts of the estate extend to the payment of legacies given by the will.
- 148. The payment of legacies is subordinate to the payment of debts of the testator, and the legatees are not entitled to the payment of their legacies until all the debts are discharged. At common law, an executor who paid or delivered a legacy, even though specific, to the legatee, was answerable to the creditors of the estate for the property which he had so deducted from the fund available for the payment of their debts, with interest from the time of the payment of the legacy.
- 149. In the United States the payment of legacies, together with the payment of debts, is generally regulated by statute, by which the executor is allowed, after a certain limited time has elapsed in which creditors may present their claims, to use in paying legacies any surplus of the estate left after paying debts which have been duly presented in that time.

The duties of the executor after he has paid all the debts of the estate which have been duly presented to him within the time limited by law, and allowed by him or by the court as valid debts of the estate, consist, in the next place, of paying and satisfying the various legacies which are given by the testator in his will, and in this chapter various points regarding such payment will be discussed.<sup>1</sup>

The rule that legacies shall only be satisfied and paid after all debts have been paid is one of obvious justice, and is recognized in the statutory enactments of all states, as well as in their judicial decisions.<sup>2</sup> The result of this rule at common law was often a source of great embarrassment to the executor, under the old system, which did not bar debts not proved in a limited time; for the executor might, and in fact sometimes did, pay over general legacies, or deliver specific legacies, to legatees, and then find that debts of the estate coming to his knowledge after the payment or delivery was made were so large as to more than exhaust the remaining assets, in which case the executor was personally liable to the creditor for his debt, with interest.<sup>3</sup>

Such a complication is impossible in the United States, where claims which are not proved within a limited time fixed by statute, or on which suit is not brought within the limited time, are barred and cannot be enforced, except in some instances, as to new assets.<sup>4</sup> After the expiration of this limited time, therefore, the executor may safely proceed to use any surplus in his hands for the payment of legacies. Even before this time has elapsed, or after, he may, by statute, pay legacies, and protect himself by requiring a refunding bond from the legatee.<sup>5</sup> In the present chapter will be discussed

<sup>1</sup> The general subject of legacies obviously belongs to the law of wills, and therefore no discussion will be given here of who may be legatees, or what are general and what specific legacies, or of the construction of general devises, or other points as to wills, except so far as may be necessary to explain the duties of the executor in paying the legacies.

<sup>2</sup> *Coddington v. Bispham*, 36 N. J. Eq. 224; *Edmunds v. Scott*, 78 Va. 720. See *Abb. Desc., Wills & Adm.* §§ 159-164; *Mechem, Cas. Succ.* p. 147 et seq. And see the statutes of every state on distribution.

<sup>3</sup> *Williams, Ex'rs*, 1340; *Spode v. Smith*, 3 Russ. 511.

<sup>4</sup> See ante, c. 17, "Payment of Debts."

<sup>5</sup> There is often a statutory provision that, if any legatee sues for his legacy within

several rules which affect the payment of legacies, but the general subject of the construction of the terms of legacies, the estate given by them, and the like, are not entered into, as they belong more properly to the law of wills.

### LEGACY AS SATISFACTION OF DEBT.

**150.** It was an established rule of courts of equity that, when a debtor decedent bequeathed to his creditor a legacy equal to or exceeding the amount of the debt, this bequest should be presumed, in the absence of any contrary intention expressed in or inferable from the will, to be meant by the testator as a payment and satisfaction of the debt.

This rule,<sup>6</sup> however, has been regarded with disfavor by the courts in modern cases where, from any circumstances in the will, it might be inferred that the testator had a different intention.<sup>7</sup> So little has this rule been favored by the courts, that in one of the more recent cases the court said that, if nothing were said on the subject in the will, the modern rule of construction would be that a bequest is to be regarded as a bounty, and not as the payment of debt, unless a contrary intent is expressed;<sup>8</sup> but in a later case the rule is stated

the time given to the executor for the payment of debts,—for example, within two years from the executor's appointment,—the executor may require the legatee to give bond to refund any part of the amount so paid which may be necessary to pay debts which may afterwards be proved against the estate, and to indemnify the executor against all loss and damage on account of such payment. *Mass. Pub. St. c. 136, § 20; Coddington v. Bispham, 36 N. J. Eq. 224; Woodward v. Woodward, 9 N. J. Law, 115, 118.* See, also, post, p. 364.

<sup>6</sup> *Williams, Ex'rs, 1297; Allen v. Merwin, 121 Mass. 379; Strong v. Williams, 12 Mass. 391; Brown v. Dawson, Prec. Ch. 240; Fowler v. Fowler, 3 P. Wms. 353; Atkinson v. Littlewood, L. R. 18 Eq. 595; Fitch v. Peckham, 16 Vt. 150; Byrne v. Byrne, 3 Serg. & R. (Pa.) 54; Horner's Ex'r v. McGaughy, 62 Pa. St. 189; Edelen's Ex'rs v. Dent's Adm'rs, 2 Gill & J. (Md.) 185.*

<sup>7</sup> *Haynes v. Mico, 1 Brown, Ch. 131; Hinchcliffe v. Hinchcliffe, 3 Ves. 529; Atkinson v. Littlewood, L. R. 18 Eq. 595; Edelen's Ex'rs v. Dent's Adm'rs, 2 Gill & J. (Md.) 185; Byrne v. Bryne, 3 Serg. & R. (Pa.) 54; Horner v. McGaughy, 62 Pa. St. 189.*

<sup>8</sup> *Smith v. Smith, 1 Allen (Mass.) 129, 130.*

to be that a legacy exactly corresponding in amount and time of payment to an existing debt of the testator to the legatee, and given by a will which contains no provision indicating a different intention, is to be presumed to be in satisfaction of the debt, and not in addition thereto.<sup>9</sup>

Slight circumstances in the will are regarded as showing a different intent. Thus, where the testator has left a legacy of less amount than the debt, or of a different nature, or upon conditions, or not equally beneficial in some particular, it is inferred that he did not intend the legacy to operate as payment of the debt.<sup>10</sup> So, where the debt was not contracted until after the making of the will, it is considered evident that the testator could not have had any intention to satisfy the debt when he made the legacy.<sup>11</sup> Nor does the rule apply when the debt was due on a current account, for it is presumed that the balance of account might be unknown to the testator.<sup>12</sup> But this presumption may be rebutted by evidence aliunde to show that the bequest was intended as satisfaction of the debt.<sup>13</sup> So where a legacy is uncertain and contingent, as where it is given upon contingency of the legatee surviving a particular party or person,<sup>14</sup> or where the legacy is part of a residue, it is not considered by the courts of equity to be intended to satisfy the debt.<sup>15</sup> And so where the legacy is not payable immediately after the death of the testator; for the debt is due at the death of the testator, and therefore the legacy should be payable at that time, if it were to operate as satisfaction of the debt.<sup>16</sup> So the legacy of a specific chattel, however great its value, is not considered satisfaction of a debt unless it is so stated in the will.<sup>17</sup> The presump-

<sup>9</sup> *Allen v. Merwin*, 121 Mass. 379.

<sup>10</sup> *Strong v. Williams*, 12 Mass. 393; *Bellasis v. Uthwatt*, 1 Atk. 428; *Eaton v. Benton*, 2 Hill (N. Y.) 576; *Partridge v. Partridge*, 2 Har. & J. (Md.) 63; *Byrne v. Byrne*, 3 Serg. & R. (Pa.) 54; *Edelen's Ex'rs v. Dent's Adm'rs*, 2 Gill & J. (Md.) 185.

<sup>11</sup> *Cranmer's Case*, 2 Salk. 508; *Jeffs v. Wood*, 2 P. Wms. 132.

<sup>12</sup> *Rawlins v. Powel*, 1 P. Wms. 299.

<sup>13</sup> *Williams v. Crary*, 8 Cow. (N. Y.) 246.

<sup>14</sup> *Crompton v. Sale*, 2 P. Wms. 553.

<sup>15</sup> *Devese v. Pontet*, 1 Cox, Ch. 188; *Nicholls v. Judson*, 2 Atk. 300.

<sup>16</sup> *Clark v. Sewell*, 3 Atk. 96, per Lord Hardwicke.

<sup>17</sup> *Byde v. Byde*, 1 Cox, Ch. 49; *Strong v. Williams*, 12 Mass. 394.

tion of satisfaction may also be rebutted by inconsistent provisions in other portions of the will, as where there is an express direction for the payment of all debts and legacies; for this direction to pay all debts is inconsistent with a presumption that the testator meant the debt to be satisfied by legacy.<sup>18</sup>

In regard to the converse of this rule, namely, the effect of a legacy bequeathed to a debtor of a testator, no presumption of a release or extinguishment of the debt exists, but such intention must be clearly expressed.<sup>19</sup> And, if the testator expressly bequeaths the debt to his debtor, this amounts to no more than a release of the debt by will, and the debt is assets subject to the payment of the testator's debts.<sup>20</sup> And so, if he expressly releases the debt to the debtor in his will, this release takes effect subject to the payment of the testator's debts.<sup>21</sup>

#### SET-OFF OF LEGACY AND DEBT.

**151. It was the rule at common law, and is also established by statute, that in any case where the legatee is indebted to the testator the executor may, when he pays the legacy, retain, by way of set-off, so much of it as is necessary to satisfy the debt, or the whole, if the debt exceeds the legacy.**

This right of set-off<sup>22</sup> does not prejudice any remedy of the executor for the recovery of the balance of the debt, nor affect the liability of the devisee or legatee for the excess of his indebtedness over the amount of his legacy.<sup>23</sup> And it has been held in England that

<sup>18</sup> *Chancey's Case*, 1 P. Wms. 410, 411; *Richardson v. Greese*, 3 Atk. 68; *Strong v. Williams*, 12 Mass. 395; *Smith v. Smith*, 1 Allen (Mass.) 129. A collection of numerous cases affecting this rule will be found in the note to *Strong v. Williams*.

<sup>19</sup> *Williams, Ex'rs*, 1304; *Brokaw v. Hudson's Ex'rs*, 27 N. J. Eq. 136.

<sup>20</sup> *Rider v. Wager*, 2 P. Wms. 331, 332.

<sup>21</sup> *Hobart v. Stone*, 10 Pick. (Mass.) 215.

<sup>22</sup> *Willock's Estate*, 30 Atl. 1043, 165 Pa. St. 522; *In re Fisher* (R. I.) 31 Atl. 579; *Smith v. Smith*, 3 Giff. 263; *Clark v. Bogardus*, 2 Edw. Ch. (N. Y.) 387; *Brokaw v. Hudson's Ex'rs*, 27 N. J. Eq. 136; *Strong's Ex'r v. Bass*, 35 Pa. St. 333.

<sup>23</sup> *Nickerson v. Chase*, 122 Mass. 296.

an executor may retain this set-off, although the remedy for collecting such a debt was, at the death of the testator, barred by the statute of limitations.<sup>24</sup> But the contrary is held in the United States, where the set-off is applied only to claims which were collectible against the deceased, and which might be set off in an action at law; and the reasoning of the English cases is said to be inapplicable in the United States, by the fact that a legacy here is considered an absolute debt at law, to be sued for as such, whereas in England it is not a debt, but a claim, which can only be enforced in equity after the assent of the executor to the legacy; and, when it is sought to enforce it in equity, those courts will compel the legatee to accept it on equitable terms, and thus may enforce the payment of a debt, although barred by the statute.<sup>25</sup> This rule of set-off also applies, although the legatee has died before the testator, if the legacy by statute survives to his children or issue,<sup>26</sup> and applies as between the executor and a creditor of the legatee who has attached the legacy.<sup>27</sup> An executor cannot retain out of a legacy the costs of a suit successfully defended by him, brought by the legatee to recover the legacy in another state.<sup>28</sup>

At common law a legacy to a debtor's wife was regarded as a legacy to her husband; but in equity it was held that the wife was entitled to a support for herself and her children out of such legacy, prior to the extinguishment of her husband's debt, and therefore the executor could not set off the debt against the legacy, except subordinate to this right of the wife to her support and that of her children.<sup>29</sup> But if the wife's equity was discharged, as by her death, the legacy became the absolute property of the husband, subject to his debt.<sup>30</sup> In most of the United States at the present time, by statute, a married woman is entitled to hold property given

<sup>24</sup> *Courtenay v. Williams*, 3 Hare, 539; *Rose v. Gould*, 15 Beav. 189; *Coates v. Coates*, 33 Beav. 249.

<sup>25</sup> *Allen v. Edwards*, 136 Mass. 141.

<sup>26</sup> *Denise's Ex'rs v. Denise*, 37 N. J. Eq. 166.

<sup>27</sup> *Strong's Ex'rs v. Bass*, 35 Pa. St. 333. Cf. post, p. 493, c. 23.

<sup>28</sup> *In re Robert's Estate*, 30 Atl. 213, 163 Pa. St. 408. Cf. ante, p. 318, c. 17.

<sup>29</sup> *Elibank v. Montolieu*, 5 Ves. 737; *Carr v. Taylor*, 10 Ves. 574.

<sup>30</sup> *Ranking v. Barnard*, 5 Madd. 32.

to her by bequest, as her own separate property, and therefore a legacy to her is clearly not subject to set-off of her husband's debt.

**PRIORITY BETWEEN LEGACIES AND CONTINGENT, FUTURE, OR UNKNOWN DEBTS.**

152. At common law an executor who paid out assets of the estate in payment of legacies was liable personally if the assets were afterwards insufficient to pay debts which accrued upon the happening of a contingency, or in the future, or of which he had no notice at the time he made the payment. Under the statutes in the United States, contingent or future debts are provided for by retaining assets at the time of payment of other debts, and there is no further liability upon the executor therefor. These debts are barred if not presented and a retainer required. Debts unknown at the expiration of the time limited by law for filing claims against the estate are barred, and cannot become a charge on the executor.

153. In case, however, the executor is by law allowed to require a refunding bond from the legatee before paying him the legacy, he may be liable to future debts if he pays the legacy without requiring such a refunding bond.

Numerous questions arose under the common law as to the payment of legacies when there were contingent debts and future liabilities of the estate. One of the earliest cases, in the time of Queen Elizabeth, decided that, as between a legacy and a bond which was not forfeited, the payment of the legacy was compellable, although the obligation of the bond, if forfeited, would cover all of the estate.<sup>81</sup> In the courts of equity, however, it was held that the executor was not bound to pay the legacy unless sufficient indemnity should be given to him to refund the legacy in case it should be nec-

<sup>81</sup> *Nector v. Gennet*, Cro. Eliz. 466.



essary for the payment of debts.<sup>32</sup> In the United States the right to require a refunding bond is generally given by statute. If the debt is of such a nature that provision cannot be made for its payment by a retainer of assets, it is held that the only remedy for the creditor is to wait till his claim becomes an actual cause of action, and then pursue the assets in the hands of legatees or devisees.<sup>33</sup>

There is, however, generally a provision by statute for the payment of future debts by retainer of assets. For example, a promissory note coming due after the settlement of the estate may at any time before the estate is finally administered be presented to the probate court, and if it appears to be justly due, the court will order the executor to retain enough of the assets to meet the claim, unless a sufficient bond for the same is given by some one interested in the estate;<sup>34</sup> and the court will make this order, although so much of the estate has already been paid away that not enough is left to meet the claim.<sup>35</sup>

Another important question under the English system of probate was whether, if an executor or administrator had paid legacies, he would thereafter be liable to creditors of whose claims he had no notice at the time he paid the legacies. Under that system the mere want of notice of a debt or claim against the estate did not excuse an administrator or executor from the payment of it, notwithstanding that he had paid legacies in ignorance of the existence of the debts.<sup>36</sup> In the United States this subject is much simplified by the provisions requiring creditors to give notice of their claims to the executor or administrator within a specified time after his appointment, or to sue on them within a limited time, under penalty of having their claims barred if they do not do so. Under such a system the executor is protected in paying legacies after he has paid all the debts and claims against the estate of which he

<sup>32</sup> *Cochrane v. Robinson*, 11 Sim. 378; *Fletcher v. Stevenson*, 3 Hare, 360-370; *Dobson v. Carpenter*, 12 Beav. 370.

<sup>33</sup> *Ames v. Ames*, 128 Mass. 278; *Spelman v. Talbot*, 123 Mass. 489.

<sup>34</sup> *Hammond v. Granger*, 128 Mass. 272, 131 Mass. 351; *Pratt v. Lamson*, 128 Mass. 528. Cf. ante, p. 336, c. 17.

<sup>35</sup> *Hammond v. Granger*, 131 Mass. 351. Cf. ante, p. 341, c. 17.

<sup>36</sup> *Williams, Ex'rs*, 1349, 1352.

had notice, or on which suit is brought within the time prescribed by law.

There is also in many states a statutory provision by which an executor, when paying a legacy, may require from the legatee a bond to refund the amount in case subsequent debts appear which are not barred and must be paid. This bond protects the executor in making the payment, and, if he pays over the legacy without taking such a bond, he is liable to a creditor for the amount of the legacy, if the payment was made before the time had elapsed which barred the claim, or if, for any reason, the claim is not barred by nonpresentation or negligence in suit.<sup>37</sup> But the fact that he does not take a refunding bond does not invalidate the title of the legatee to the amount paid him.<sup>38</sup>

#### · ABATEMENT OF LEGACIES.

154. If the assets are not sufficient to pay all legacies, the order of payment as established by courts of equity is as follows: Specific legacies and devises are to be paid in preference to general legacies and devises. And, in the absence of any special provisions in the will, all the general legacies and devises must abate equally their proportion of the whole amount bequeathed; and annuities, if not payable from any particular fund, stand on the same footing as general legacies. The above order may be varied by the will of the testator.

The order of payment of legacies may become important if the assets are not enough to pay all the legacies. The general rule in courts of equity is that specific legacies are payable before general legacies and devises,<sup>39</sup> and that general legacies and devises must all abate proportionately if the assets are not enough for all;<sup>40</sup> an-

<sup>37</sup> *In re Robin's Estate*, 4 Pa. Dist. R. 277.

<sup>38</sup> *Ferguson v. Yard*, 30 Atl. 517, 164 Pa. St. 586.

<sup>39</sup> *Towle v. Swasey*, 106 Mass. 100-104; *Humes v. Wood*, 8 Pick. (Mass.) 478; *Wallace v. Wallace*, 23 N. H. 155; *Knecht's Appeal*, 71 Pa. St. 333.

<sup>40</sup> *Fonbl. Eq. bk. 4, pt. 1, c. 2, § 5*; *Emery v. Batchelder*, 3 Atl. 733, 78 Me.

nuities, if not payable from any specific fund, ranking along with general legacies.<sup>41</sup>

This rule as to the abatement of legacies is subject to any expressed or inferable intention of the testator in his will, directing the manner or the order of priority in which the various legacies shall abate in case of a deficiency of assets. For instance, a testator may give one general legatee a priority over others.<sup>42</sup> But this intention to give one legacy priority over others must be clearly and distinctly shown by the will; otherwise it will not be allowed.<sup>43</sup> The rule as to abatement is also subject to this further exception: that, where a legacy is given to one in satisfaction or lieu of some valuable right (for example, where a legacy is in lieu of dower or curtesy), the legatee is deemed a quasi purchaser, and his legacy will not abate until those of mere beneficiaries of the same class are exhausted.<sup>44</sup> The meritorious consideration of near relationship to the testator by blood or marriage will not have that effect; but it has been held that a general legacy for the support, maintenance, or education of a near relative, otherwise unprovided for, shall have a preference over other general legacies.<sup>45</sup> If the assets generally bequeathed are not sufficient to pay all the debts, all the specific legatees must abate their legacies equally, as debts have the prior claim upon the whole estate over all voluntary dispositions.<sup>46</sup> The whole subject of abatement of legacies depends entirely upon the construction of the will, and further discussion of it will be omitted in this work.

233; *Farnum v. Bascom*, 122 Mass. 282; *Titus' Adm'r v. Titus*, 26 N. J. Eq. 117.

<sup>41</sup> *Emery v. Batchelder*, 3 Atl. 733, 78 Me. 233.

<sup>42</sup> *Lewin v. Lewin*, 2 Ves. Sr. 415.

<sup>43</sup> *Towle v. Swasey*, 106 Mass. 104, 105; *Everett v. Carr*, 59 Me. 330, 331; *Swasey v. Society*, 57 Me. 523.

<sup>44</sup> *Pollard v. Pollard*, 1 Allen (Mass.) 490; *Farnum v. Bascom*, 122 Mass. 282; *Howard v. Francis*, 30 N. J. Eq. 448.

<sup>45</sup> *Bliven v. Seymour*, 88 N. Y. 475.

<sup>46</sup> *Sleech v. Thorington*, 2 Ves. Sr. 561, 564; *Clifton v. Burt*, 1 P. Wms. 680; *Farnum v. Bascom*, 122 Mass. 282; *Shreve's Ex'rs v. Shreve*, 10 N. J. Eq. 385. Cf. ante, p. 350.

## ASSENT OF EXECUTOR TO LEGACY.

155. The right of a legatee to his legacy was at common law merely inchoate, subsequent to the probate of the will, until the executor had assented to the legacy. The legatee's right being therefore imperfect, he had no right to take possession of a specific thing bequeathed; and if he did so the executor might maintain an action of trespass or trover against him, or, if it was in the possession of the legatee, the executor might sue to recover possession of it.
156. If the legacy were a general one, the legatee could not proceed for it at law until the assent of the executor, but might proceed in equity in a suit which involved the general administration of the estate.
157. In the United States the assent of the executor is immaterial in those states in which, by statute, the legatee may sue for the legacy after the time limited for presentation and payment of debts has elapsed. In such states the executor may defend by showing that the assets have been exhausted by paying debts or superior legacies. In states where no such right of suit is given by statute the common-law rules as to assent still apply, unless by statute the assent is dispensed with.

The following discussion of the rules as to assent of the executor is given because the subject still has practical importance in some states, and also as illustrating the common-law system of paying legacies:

The rule that the property in a specific legacy did not vest in the legatee till the assent of the executor<sup>47</sup> was intended to prevent a

<sup>47</sup> Went. Off. Ex'r (14th Ed.) 409; Mead v. Lord Orrery, 3 Atk. 239; Deeks v. Strutt, 5 Term R. 690; Doe v. Guy, 3 East, 124; Williams v. Lee, 3 Atk. 223; Colwell v. Alger, 5 Gray (Mass.) 67; Blackler v. Boott, 114 Mass. 24, 26.

testator from defrauding his creditors by bequeathing all his property to various people, who, if their right were complete at probate of the will, might take possession of the property to the defrauding of the creditors.<sup>48</sup> The assent of the executor may at common law be expressed, or implied from indirect expressions or particular acts, and an implied assent is equally available as an express.<sup>49</sup> For instance, if a horse is bequeathed, and the executor requests the legatee to dispose of it, or if a third person proposes to purchase the horse of the executor, and he directs him to buy it of the legatee, or if the executor himself purchase the horse of the legatee, or offers money for it, any of these facts amounts to an assent by implication to the legacy.<sup>50</sup> But the expressions or circumstances from which the assent is to be inferred must be unambiguous, inasmuch as it subjects the executor to liability for waste if he assents to it, and there is a deficiency of assets for the payment of debts.<sup>51</sup> If the executor assent to the interest of A. in a bequest of a term of years to A. for life, and remainder to B., this assent is sufficient to vest B.'s interest in him also, since the assent is to the whole legacy.<sup>52</sup> The assent of the executor may sometimes be presumed, as where a chattel specifically bequeathed remains in the possession of the legatee a long time without any objection by the executor.<sup>53</sup> The assent to a legacy might, at common law, be given by an executor before his

<sup>48</sup> Went. Off. Ex'r (14th Ed.) 69, 409; *Andrews v. Hunneman*, 6 Pick. (Mass.) 129; *Matthews v. Turner*, 21 Atl. 224, 64 Md. 109.

<sup>49</sup> *Rea v. Rhodes*, 5 Ired. Eq. (N. C.) 148; *Edney v. Bryson*, 2 Jones (N. C.) 365; *Thompson v. Schmidt*, 3 Hill (S. C.) 156; *McClanahan v. Davis*, 8 How. 170, 178.

<sup>50</sup> Went. Off. Ex'r (14th Ed.) 414.

<sup>51</sup> 1 Rop. Leg. 736; *Rea v. Rhodes*, 5 Ired. Eq. (N. C.) 148; *George v. Goldsby*, 23 Ala. 326.

<sup>52</sup> *Welcren v. Elkington*, Plowd. 521; *Lampet's Case*, 10 Coke, 47b; *Hunter v. Green*, 22 Ala. 329; *Thrasher v. Ingram*, 32 Ala. 645; *Hearne v. Kevan*, 2 Ired. Eq. (N. C.) 34; *Acheson v. McCombs*, 3 Ired. Eq. (N. C.) 554; *Lewis v. Smith*, 4 Dev. & B. (N. C.) 326; *Conner v. Satchwell*, 4 Dev. & B. (N. C.) 72; *Hall v. Hall*, 27 Miss. 458; *Parker v. Chambers*, 24 Ga. 518; *Frazer's Adm'r v. Bevill*, 11 Grat. (Va.) 9; *Lott v. Meacham*, 4 Fla. 144; *Finch v. Rogers*, 11 Humph. (Tenn.) 559.

<sup>53</sup> *Andrews v. Hunneman*, 6 Pick. (Mass.) 126; *Hall v. Hall*, 27 Miss. 458; *Parker v. Chambers*, 24 Ga. 518; *Vaughn v. Howard*, 75 Ga. 285; *Frazer's Adm'r v. Bevill*, 11 Grat. (Va.) 9; *George v. Goldsby*, 23 Ala. 326.

appointment.<sup>54</sup> If there are several executors, the assent of any one is enough to transfer the right of possession to the legatee.<sup>55</sup>

In case of a legacy to the executor himself, an assent is necessary before the property in the thing bequeathed vests in him. This assent may be express or implied,<sup>56</sup> but naturally is more often implied from the conduct or indirect expressions of the executor. Thus, if he, by deed or will or sale, assumes to dispose of the legacy as his own, he is presumed to have assented to it;<sup>57</sup> but this presumption does not hold when he disposes of the legacy in his character of executor.<sup>58</sup> So if he takes the rent on a lease bequeathed to him, or repairs the tenements at his own expense, or excludes a co-executor from possession of the premises, these acts indicate his assent to the legacy.<sup>59</sup>

The effect of the assent of the executor to a specific legacy is, at common law, to vest the interest in the chattel in the legatee, who thereupon has the right to the possession of the thing bequeathed, and may bring trover even against the executor to recover the possession of the thing bequeathed.<sup>60</sup> And, as to a general legacy, such assent is a condition precedent to the right of action by the legatee for the legacy at common law, although the legatee might proceed in equity without such assent, since in the equitable action all the conflicting interests would be considered, and the legacy ordered to be paid only if sufficient assets appeared, thus rendering the assent of the executor superfluous.<sup>61</sup>

The assent of an executor, once given, is, at law, irrevocable, and

<sup>54</sup> Went. Off. Ex'r (14th Ed.) 82; Godol. pt. 2, § 20, subd. 1. But cf. ante, p. 247, c. 15.

<sup>55</sup> *Adie v. Cornwell*, 3 T. B. Mon. (Ky.) 276.

<sup>56</sup> *Murphree v. Singleton*, 37 Ala. 412.

<sup>57</sup> Com. Dig. "Administration," C, 6; *Fenton v. Clegg*, 9 Exch. 680; *Merritt v. Windley*, 3 Dev. (N. C.) 399.

<sup>58</sup> *Cheny & Smith's Case*, 1 Leon. 216.

<sup>59</sup> Com. Dig. "Administration," C, 6; *Cheny & Smith's Case*, 1 Leon. 216; *Anon.* 3 Dyer, 277b.

<sup>60</sup> *Andrews v. Hunneman*, 6 Pick. (Mass.) 129; *Matthews v. Turner*, 21 Atl. 224, 64 Md. 121; *Kent v. Somervell*, 7 Gill & J. (Md.) 265; *Onondaga Trust & Deposit Co. v. Price*, 87 N. Y. 547; *Eberstein v. Camp*, 37 Mich. 177; *Rea v. Rhodes*, 5 Ired. Eq. (N. C.) 148.

<sup>61</sup> *Coates v. Mackie*, 43 Md. 127.

vests the property in the thing bequeathed in the legatee.<sup>62</sup> At common law it was held that if the legatee had taken possession of the thing bequeathed, or had been paid his legacy, he could not be compelled to redeliver or refund except when the executors found that valid debts, which had been, through no fault of his, unknown to him until after such assent, rendered the assets insufficient to pay the debts of the estate. In such a case the executor might, by bill in equity, compel the legatee to refund, if he could do so without injury to the interests of innocent third persons.<sup>63</sup> This case cannot arise in the United States, as before stated, on account of the very full statutory provisions limiting the recovery of debts against the estate to those of which notice has been given by the creditor, or suit brought within a certain limited time, and prescribing the proper mode of settling the estate. And the executor may, in many states, protect himself under the provisions of statute in regard to compelling the legatee to give a refunding bond.<sup>64</sup>

In most of the United States the necessity of the assent of an executor to a legacy is done away with by statute, and the legatee may sue for his legacy at law after a certain time has elapsed from the beginning of administration, but the executor may defend such a suit by showing that the assets of the estate are not sufficient to pay the debts.<sup>65</sup> Such a suit may be brought against the administrator cum testamento annexo, while the estate is unsettled, just as it might have been against the executor.<sup>66</sup> And if the legatee dies the ac-

<sup>62</sup> Went. Off. Ex'r (14th Ed.) 415; Com. Dig. "Administration," C, 8; *Onondaga Trust & Deposit Co. v. Price*, 87 N. Y. 547; *Eberstein v. Camp*, 37 Mich. 177.

<sup>63</sup> *Nelthrop v. Biscoe*, Ch. Cas. 136; *Walker v. Hill*, 17 Mass. 384, 385; *Davis v. Newman*, 2 Rob. (Va.) 664; *Gallego's Ex'rs v. Attorney General*, 3 Leigh (Va.) 485, 486; *Alexander v. Fox*, 2 Jones, Eq. (N. C.) 106.

<sup>64</sup> Cf. ante, pp. 356, 358.

<sup>65</sup> *Allen v. Edwards*, 136 Mass. 138; *Pollard v. Pollard*, 1 Allen (Mass.) 490; *Epler v. Epler*, 13 Ill. App. 472; *Fitch v. Randall*, 40 N. E. 182, 163 Mass. 381.

<sup>66</sup> *Smith v. Fellows*, 131 Mass. 20; Mass. Pub. St. c. 136, § 19; *Blackler v. Boott*, 114 Mass. 24, 26; *Colwell v. Alger*, 5 Gray (Mass.) 67; *Pollard v. Pollard*, 1 Allen (Mass.) 490; *Kent v. Dunham*, 106 Mass. 586; *Tappan v. Tappan*, 30 N. H. 50; *Warren v. Rogers*, 2 Root (Conn.) 156; *Knapp v. Hanford*, 6 Conn. 176; *Colt v. Colt*, 32 Conn. 422, 451; *Smith v. Lambert*, 30 Me. 137; *Prescott v. Morse*, 62 Me. 447; *Cowell v. Oxford*, 6 N. J. Law, 432; *Clark v. Herring*, 5 Bin. (Pa.) 33.

tion may be brought by his personal representatives, but not by his heirs.<sup>67</sup>

### TIME OF PAYMENT OF LEGACIES.

**158.** The time when legacies shall be paid may depend upon the directions of the testator in the will, or upon statutory provisions. In the absence, however, of directions in the will, or of statutory provisions, a legacy is payable at the end of one year from the testator's death, and interest begins to run from that time.

In most of the United States, as has been seen above, the time when legacies may be sued for, and are therefore absolutely payable, is fixed by statute, so that, while a legacy may be paid before that time by an executor at his peril, yet he cannot be compelled to pay till then.<sup>68</sup> Nor does interest begin to run upon the legacy till then, unless it be by some intention of the testator shown in the will.<sup>69</sup> If the statutes do not fix the time, and there is no conflicting intention of the testator, a year is generally given to the executor, from his appointment, before he can be required to pay legacies. This rule is based upon the fact that the executor needs a certain amount of time generally to look into the estate, and see if the assets are sufficient to pay the debts. In some states this period of a year before payment of legacies is given by statute.<sup>70</sup> In others there is no statute upon this subject; but the court has allowed a suit for a legacy, brought a little more than a year after the appointment of the administrator, and the opinion holds that one year is given to the executor before he is liable to such a suit.<sup>71</sup>

In case of a residuary legacy, it cannot be known whether the legacy will be valid until it is known whether the debts and other

<sup>67</sup> *Osgood v. Foster*, 5 Allen (Mass.) 560.

<sup>68</sup> *Wood v. Penoyre*, 13 Ves. 333, 334; *Pearson v. Pearson*, 1 Schoales & L. 11; *Smith v. Lambert*, 30 Me. 140; *Wheeler v. Ruthven*, 74 N. Y. 431.

<sup>69</sup> *Smith v. Lambert*, 30 Me. 140; *Wheeler v. Ruthven*, 74 N. Y. 431. See post, p. 369.

<sup>70</sup> *Smith v. Lambert*, 30 Me. 140.

<sup>71</sup> *Brooks v. Lynde*, 7 Allen (Mass.) 64, 67.



legacies will exhaust the assets. The right of a residuary legatee to the payment of his legacy being so dependent, he cannot bring suit for the payment thereof without showing such facts as justify the payment either of the whole or a part of the residue to him,—that is, that the executor has assets not needed to pay debts or the other legacies, and that the payment will not be injurious to the estate,—and these facts may not arise till long after the end of the year.<sup>72</sup> But the legacy is due at the end of the year, so far as concerns interest.<sup>73</sup>

### TO WHOM A LEGACY IS TO BE PAID.

**159.** In the payment of legacies the executor acts at his own peril, unless he is acting under an order of the court, and he must decide to whom legacies are to be paid. It is not in every case sufficient to pay the legacy to the person named or described in the will as legatee, for he may be under some disability.

Thus, if the legatee is an infant the legacy cannot be paid to him, nor to his father or to any relative, without the sanction of a court of equity,<sup>74</sup> for the proper person to whom such payment is to be made is the guardian duly appointed,—and the same is true in the case of other persons under guardianship, such as non compotes, spendthrifts, and the like,<sup>75</sup>—unless the legacy is expressly made to some one in trust for the child, or to hold for the child, or for some other trust, in which case the legacy may be paid to the trustee.<sup>76</sup> It should also be noticed that a guardian or trustee appointed in one state is not entitled to receive the payment of a

<sup>72</sup> *Minot v. Amory*, 2 Cush. (Mass.) 382; *Treadwell v. Cordis*, 5 Gray (Mass.) 352; *Smith v. Lambert*, 30 Me. 146; *Gilman v. Gilman*, 63 N. Y. 41.

<sup>73</sup> See post, p. 369.

<sup>74</sup> *Dagley v. Tolferry*, 1 P. Wms. 285; *McKnight's Ex'rs v. Walsh*, 23 N. J. Eq. 136.

<sup>75</sup> *Newcomb v. Williams*, 9 Metc. (Mass.) 535; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Kent v. Dunham*, 106 Mass. 586; *Sparhawk v. Buell*, 9 Vt. 41; *Genet v. Tallmadge*, 1 Johns. Ch. (N. Y.) 3.

<sup>76</sup> 1 *Rop. Leg.* (3d Ed.) 771; *Lowell's Appeal*, 22 Pick. (Mass.) 215.

legacy in another, where the estate is being administered; but there should be a guardian, duly appointed and giving proper security, in the latter state.<sup>77</sup>

At common law, in the absence of statutory provision allowing a married woman to receive bequests as her own property, a legacy to a married woman is to be paid to her husband, if he is alive when the legacy is paid, or, if he is dead, to his executors or administrators, if he had during his life reduced it to possession by getting judgment for it, or in other ways; but, if he has died without reducing it to possession, it should be paid to the wife or her representatives, as her right to it in such case revives.<sup>78</sup> In most of the United States married women's statutes, giving them the legal right to their separate property, allow them to receive legacies free from the control of their husbands, and as their separate property; and the legacy may be paid to the wife, and her receipt for or release of the legacy is valid. But such statutes cannot operate upon any vested interest of a husband in a legacy to his wife existing at the time of the passage of the statute.<sup>79</sup>

In the absence of statutes allowing married women to hold separate bequests, the husband may bring suit for her legacy in his wife's name, and a judgment and payment to him make the legacy his property.<sup>80</sup> A legacy to the wife may be attached or trusted by the husband's creditors before payment,<sup>81</sup> but the attachment will not defeat the wife's right of survivorship, if the husband dies without reducing the legacy to possession, and therefore it should in such case be paid to her.<sup>82</sup> Even if the wife has been divorced a mensa et thoro, the husband alone is entitled to the legacy.<sup>83</sup>

<sup>77</sup> *Morrell v. Dickey*, 1 Johns. Ch. (N. Y.) 153; *McLoskey v. Reid*, 4 Bradf. Sur. (N. Y.) 334.

<sup>78</sup> *Palmer v. Trevor*, 1 Vern. 261; *Toll. Ex'rs*, 320; *Alexander v. Crittenden*, 4 Allen (Mass.) 342; *Hayward v. Hayward*, 20 Pick. (Mass.) 517.

<sup>79</sup> *Dunn v. Sargent*, 101 Mass. 336. As to what states allow married women to hold bequests, see the local statutes of each state.

<sup>80</sup> *Alexander v. Crittenden*, 4 Allen (Mass.) 342. Cf. ante, p. 355.

<sup>81</sup> *Alexander v. Crittenden*, 4 Allen (Mass.) 342; *Holbrook v. Waters*, 19 Pick. (Mass.) 354; *Wheeler v. Bowen*, 20 Pick. (Mass.) 563. Cf. post, p. 493, c. 23.

<sup>82</sup> *Strong v. Smith*, 1 Metc. (Mass.) 476; post, p. 498, c. 23.

<sup>83</sup> *Stephens v. Totty*, Cro. Eliz. 908; *Chamberlain v. Hewson*, 1 Salk. 115.

Equity, however, will compel the husband to make a settlement upon the wife before it will compel or allow the payment of the legacy to him.<sup>84</sup> The amount to be settled on the wife varies according to the circumstances of the case, even amounting to the whole legacy in proper cases, as where she has been deserted by the husband, or he is unable to maintain her, and the like.<sup>85</sup>

This right in equity to enforce a settlement in favor of the wife before payment of the legacy may be lost by misconduct of the wife, as, for example, where she is living in adultery apart from her husband,<sup>86</sup> or she may waive it, and expressly consent to her husband receiving the legacy.<sup>87</sup> But it is superior to the rights of her husband's creditors, whether they claim by attachment, or by voluntary assignment, or by involuntary transfer, as by operation of the bankruptcy laws,<sup>88</sup> except that in some states, at law, an attachment is a valid lien on the legacy during the husband's life; and payment of the legacy to the attaching creditor may within that time be enforced at law, without regard to any provision for the wife.<sup>89</sup>

This right to a settlement before payment of the legacy is personal to the wife, and does not survive to her children, or go to her representatives and assignees,<sup>90</sup> unless a decree has already been entered in favor of the wife, in which case the children can enforce it.<sup>91</sup> It is, of course, always possible for the executor to defeat this equitable right of the wife by paying over the legacy to the

<sup>84</sup> *Brown v. Elton*, 3 P. Wms. 202; *Lady Elibank v. Montolieu*, 5 Ves. 742, in note; *Davis v. Newton*, 6 Metc. (Mass.) 543. Cf. ante, p. 366.

<sup>85</sup> *Scott v. Spashett*, 3 Macn. & G. 599; *Dunkley v. Dunkley*, 2 De Gex, M. & G. 390; *Davis v. Newton*, 6 Metc. (Mass.) 544.

<sup>86</sup> *Carr v. Eastabrooke*, 4 Ves. 146.

<sup>87</sup> *Willats v. Cay*, 2 Atk. 67; *Milner v. Colmer*, 2 P. Wms. 641.

<sup>88</sup> *Davis v. Newton*, 6 Metc. (Mass.) 543, 544; *Dunkley v. Dunkley*, 2 De Gex, M. & G. 390; *Haviland v. Bloom*, 6 Johns. Ch. (N. Y.) 178; *Kenny v. Udall*, 5 Johns. Ch. (N. Y.) 464.

<sup>89</sup> *Strong v. Smith*, 1 Metc. (Mass.) 476; *Davis v. Newton*, 6 Metc. (Mass.) 543, 544. Cf. post, p. 497, c. 23.

<sup>90</sup> *Winch v. Brutton*, 14 Sim. 379; *Scriven v. Tapley*, Amb. 509; *Murray v. Lord Elibank*, 10 Ves. 84; 1 *Rop. Husb. & Wife* (2d Ed.) 264.

<sup>91</sup> *Rowe v. Jackson*, 2 Dickens, 604; *Fenner v. Taylor*, 1 Sim. 171; *Groves v. Perkins*, 6 Sim. 584; *De La Garde v. Lempriere*, 6 Beav. 344, 345.

husband, in which case the opportunity for the interference of a court of equity is gone; but after the commencement of a suit to establish this right the executor no longer has the right to make such a payment,<sup>92</sup> and the executor may always refuse to make such payment until the husband has made the proper settlement.<sup>93</sup>

When a legacy is given generally to one for life, with a limitation over to others upon his death, the legacy should be paid to the legatee without requiring any security from him to secure the estate from waste in his hands, unless there appears to be danger of his wasting, secreting, or removing the property.<sup>94</sup> If the legacy is a specific legacy for life to one, and absolutely after the life estate to another, and the executor delivers it to the life tenant, and takes a proper receipt or inventory for the remainder-man, he is discharged from further liability.<sup>95</sup> Where a legatee has been abroad, and not heard of, for a long time, the courts have sometimes allowed payment to the persons to whom the legacy goes on the death of the legatee, upon their giving security to refund in case of his returning.<sup>96</sup>

If the legatee has died, the legacy is payable to his administrator or executor.<sup>97</sup> A legacy is liable to attachment or to trustee or garnishee process at any time after the interest in it has vested in the legatee, and before payment to the legatee. Therefore, when an executor has been summoned as trustee of a legatee, or the legacy has been attached, he is obliged to retain the legacy until the judgment in the case allows him to dispose of it, either by payment to the legatee or to the plaintiff in the case, as the judgment may be.<sup>98</sup> It has been held that a specific legacy—for ex-

<sup>92</sup> *Murray v. Lord Elbank*, 10 Ves. 90; *Doswell v. Earle*, 12 Ves. 473.

<sup>93</sup> *In re Swan*, 2 Hem. & M. 34.

<sup>94</sup> *Taggard v. Piper*, 118 Mass. 315; *Sampson v. Randall*, 72 Me. 112; *Schmaunz v. Goss*, 132 Mass. 146; *Howard v. Howard's Ex'rs*, 16 N. J. Eq. 486.

<sup>95</sup> *Dodson v. Sevars*, 30 Atl. 477, 52 N. J. Eq. 611.

<sup>96</sup> *Norris v. Norris*, Finch, 419; *Bailey v. Hammond*, 7 Ves. 590; *Dowley v. Winfield*, 14 Sim. 277; *Cuthbert v. Purrier*, 2 Phil. Ch. 199.

<sup>97</sup> *Richardson v. Morey*, 18 Pick. (Mass.) 192.

<sup>98</sup> *Strong's Ex'r v. Bass*, 35 Pa. St. 333; *Capen v. Duggan*, 136 Mass. 501; *Vantine v. Morse*, 104 Mass. 276. Cf. ante, p. 364, post, p. 539, c. 24.

ample, of shares in stock, standing in the name of the testator—is attachable by trustee process for a debt due by his estate.<sup>99</sup> This probably would not be so held after the assent of the executor in states where this is required, as the effect of such assent is to vest the title to the specific article bequeathed in the legatee.<sup>100</sup> When a legacy is left to one who has become bankrupt or insolvent, it is payable to the assignee, unless the bankrupt has received his discharge or certificate before the death of the testator, in which case the legacy is payable to him.<sup>101</sup> When a legacy has been charged by the legatee with a debt or other burden, and the executor has been notified thereof, no further payments can be made thereon.<sup>102</sup> The probate court cannot pass upon the validity of a voluntary assignment of a legacy, and will therefore not pay to the assignee, unless upon the order or consent of the legatee.<sup>103</sup> A fortiori, it will not pay to a mere creditor of a devisee, who fails to show any lien upon or title to the devise.<sup>104</sup>

#### PROFITS AND INTEREST ON LEGACY.

160. The increase or produce of a specific legacy from the death of the testator belongs to the legatee.
161. General legacies carry interest to the legatee from the time when they are payable, which may be fixed by statute, or by the will of the testator. In the absence of either, the legacy bears interest after one year from the testator's death.
162. The rate of interest is, in the absence of specific directions by the will, or by statute, the legal rate of simple interest on debts.

As to specific legacies, the increase or produce of them from the time of the testator's death belongs to the legatee, because the legacy vests in him then.<sup>105</sup> So, where there is a specific bequest of

<sup>99</sup> *Vantine v. Morse*, 104 Mass. 276.

<sup>100</sup> See ante, p. 360.

<sup>101</sup> *Ex parte Ansell*, 19 Ves. 208.

<sup>102</sup> *Stephens v. Venables*, 30 Beav. 625.

<sup>103</sup> *Johnson v. Jones*, 47 Mo. App. 237.

<sup>104</sup> *Davis v. Davis*, 21 S. E. 1002, 96 Ga. 136.

<sup>105</sup> *Sleech v. Thorington*, 2 Ves. Sr. 563; *Beal v. Crafton*, 5 Ga. 301; *Sulli-*

stock, the dividends belong to the legatee from the death of the testator;<sup>106</sup> and the increase of cattle specifically bequeathed belongs to the legatee.<sup>107</sup>

General legacies carry interest from the time when they are payable, which depends largely upon the terms of the legacy itself, or upon statutes. If no time for the payment of the legacy is fixed, interest generally does not begin to run till one year from the death of the testator.<sup>108</sup> Although interest on a legacy is not allowed till the end of a year from the testator's death, yet when the income of a fund is given the income begins immediately upon the death of the testator, and interest is allowed upon the income, if it is not paid at the end of the year from the testator's death, when it is due.<sup>109</sup> The fact that there are not sufficient assets to allow the legacy to be paid when it is due does not prevent the accumulation of interest thereon until it is paid.<sup>110</sup>

When a legacy is given by a parent to a child, or for the support of a child, and no other provision is made for the maintenance of the child, it is presumed that the testator intends the child to have the benefit of the legacy from the death of the testator; and interest therefore begins to run from the death of the testator, although the legacy may not be payable till the legatee reaches his majority.<sup>111</sup>

van v. Winthrop, Fed. Cas. No. 13,600, 1 Sumn. 12; Evans v. Iglehart, 6 Gill. & J. (Md.) 171; Jones v. Ward, 10 Yerg. (Tenn.) 160.

<sup>106</sup> Barrington v. Tristram, 6 Ves. 345.

<sup>107</sup> Went. Off. Ex'r, 445.

<sup>108</sup> Wood v. Penoyre, 13 Ves. 333, 334; Rotch v. Emerson, 105 Mass. 431; Dawes v. Swan, 4 Mass. 208; Martin v. Martin, 6 Watts (Pa.) 67; Huston's Appeal, 9 Watts (Pa.) 473, 475, 477; Derby v. Derby, 4 R. I. 414; Budd v. Garrison, 45 Md. 418; Sparks v. Weedon, 21 Md. 156; Hoagland v. Schenck, 16 N. J. Law, 370; Halsted v. Meeker, 18 N. J. Eq. 136; Bradner v. Faulkner, 12 N. Y. 474; Wheeler v. Ruthven,<sup>74</sup> N. Y. 431; Cooke v. Meeker,<sup>76</sup> 36 N. Y. 18; Loring v. Woodward, 41 N. H. 391, 393.

<sup>109</sup> Ayer v. Ayer, 128 Mass. 577; Lovering v. Minot, 9 Cush. (Mass.) 157; Minot v. Amory, 2 Cush. (Mass.) 380; Cushing v. Burrell, 137 Mass. 21; Weld v. Putnam, 70 Me. 212; Cooke v. Meeker,<sup>76</sup> 36 N. Y. 18.

<sup>110</sup> Pearson v. Pearson, 1 Schoales & L. 10; Kent v. Dunham, 106 Mass. 586.

<sup>111</sup> King v. Talbot, 40 N. Y. 76; Cooke v. Meeker, 36 N. Y. 22; Brown v. Knapp, 79 N. Y. 140; Magoffin v. Patton, 4 Rawle (Pa.) 113, 119; Loring v. Woodward, 41 N. H. 393; Sullivan v. Winthrop, Fed. Cas. No. 13,600, 1 Sumn.

But a natural child,<sup>112</sup> or a niece or a goddaughter, cannot claim interest from the date of the testator's death,<sup>113</sup> although in one case a natural daughter was allowed to receive from the father's death maintenance expressly given to her.<sup>114</sup> As to a grandchild, it has been held that he cannot;<sup>115</sup> but the contrary has been held in Pennsylvania, when the father was dead, the grandfather then being in loco parentis.<sup>116</sup> Nor can the child, if other provision is made for its maintenance in the will.<sup>117</sup> And it is only children under age who may claim this exception to the general rule.<sup>118</sup> And in case of a daughter, if she is married and her husband is able to support her, as he is presumed to be in absence of proof to the contrary, the daughter is only entitled to interest from the end of the year.<sup>119</sup>

The widow may claim interest from the date of the testator's death, when her legacy takes the place of dower, and there is no other provision made for her in the will;<sup>120</sup> but not otherwise generally,<sup>121</sup> nor when the legacy, although given in lieu of dower, is itself in the nature of interest or income, as when a certain sum is to be paid each day.<sup>122</sup>

14; *Minot v. Amory*, 2 Cush. (Mass.) 384; *Hennion v. Jacobus*, 27 N. J. Eq. 28; *Fowler v. Colt*, 22 N. J. Eq. 49, 50; *Howard v. Francis*, 30 N. J. Eq. 444; *Budd v. Garrison*, 45 Md. 418.

<sup>112</sup> *Lowndes v. Lowndes*, 15 Ves. 301; *Sullivan v. Winthrop*, Fed. Cas. No. 13,600, 1 Sumn. 14.

<sup>113</sup> *Sullivan v. Winthrop*, Fed. Cas. No. 13,600, 1 Sumn. 14; *Page's Appeal*, 71 Pa. St. 402.

<sup>114</sup> *Newman v. Bateson*, 3 Swanst. 689.

<sup>115</sup> *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614, 628; *Huston's Appeal*, 9 Watts (Pa.) 476; *Leech's Appeal*, 44 Pa. St. 140; *Kerr v. Bosler*, 62 Pa. St. 183, 188; *Howard v. Francis*, 30 N. J. Eq. 444.

<sup>116</sup> *Bowman's Appeal*, 34 Pa. St. 19, 23.

<sup>117</sup> *Williamson v. Williamson*, 6 Paige (N. Y.) 299; *Sullivan v. Winthrop*, Fed. Cas. No. 13,600, 1 Sumn. 13, 14.

<sup>118</sup> *Sullivan v. Winthrop*, Fed. Cas. No. 13,600, 1 Sumn. 1, 13-15; *Hennion's Ex'rs v. Jacobus*, 27 N. J. Eq. 28; *Howard v. Francis*, 30 N. J. Eq. 444.

<sup>119</sup> *Hennion's Ex'rs v. Jacobus*, 27 N. J. Eq. 28.

<sup>120</sup> *Pollard v. Pollard*, 1 Allen (Mass.) 490; *Pollock v. Learned*, 102 Mass. 49; *Towle v. Swasey*, 106 Mass. 100. *Contra*, *Howard v. Francis*, 30 N. J. Eq. 448; *Acquackanonk Church v. Ackerman*, 1 N. J. Eq. 40, 43.

<sup>121</sup> *Stent v. Robinson*, 12 Ves. 461.

<sup>122</sup> *Kent v. Dunham*, 106 Mass. 586.

*Rate of Interest on Legacy.*

The rate of interest is generally the same as the legal rate of simple interest on debts, if there is any fixed, for the interest is not usually a charge on the executor, but an accessory of the legacy,<sup>123</sup> although a higher rate, or compound interest, is sometimes imposed by the court as a punishment for misconduct or neglect of the executor in not investing the funds of the estate as directed by the testator, or for appropriating them to his own use.<sup>124</sup> In Massachusetts the rule in such a case is to add each year's interest to the principal, and make that the principal for the next year, or, as it is called, compute the interest with annual rests.<sup>125</sup> The subject of rate of interest is more fully examined in treating of the management of the estate, to which portion of the work the reader is referred.<sup>126</sup>

*Money in Which Legacies should be Paid.*

The money in which pecuniary legacies should be paid, if there is no direction in the will, is that current in the country where the testator was domiciled at the time of making the will, and not the currency of the place where the legatee resides.<sup>127</sup> If the testator directs payment in foreign coin, that coin, or its equivalent in the place where the estate is being settled and the testator resided, should be used.<sup>128</sup>

If the executor makes an overpayment to a legatee, the probate court cannot help him to recover it on a proceeding for accounting, but he must resort to an action at law.<sup>129</sup>

<sup>123</sup> *Kent v. Dunham*, 106 Mass. 586; *Salisbury v. Colt*, 27 N. J. Eq. 492; *Miller v. Congdon*, 14 Gray (Mass.) 118.

<sup>124</sup> *Crackelt v. Bethune*, 1 Jac. & W. 586; *Raphael v. Boehm*, 11 Ves. 92; *Dornford v. Dornford*, 12 Ves. 127; *Elliott v. Sparrell*, 114 Mass. 404; *Fowler v. Colt*, 22 N. J. Eq. 47.

<sup>125</sup> *Miller v. Congdon*, 14 Gray (Mass.) 118; *Elliott v. Sparrell*, 114 Mass. 404.

<sup>126</sup> *Ante*, p. 272, c. 15.

<sup>127</sup> *Saunders v. Drake*, 2 Atk. 466; *Lansdowne v. Lansdowne*, 2 Bligh, 92; *Holmes v. Holmes*, 1 Russ. & M. 660.

<sup>128</sup> *Cockerell v. Barber*, 16 Ves. 461; *Bowditch v. Soltyk*, 99 Mass. 136, 140. See, also, *post*, p. 396, c. 19.

<sup>129</sup> *Lang v. Stringer's Estate*, 39 N. E. 363, 144 N. Y. 275; *In re Wheeler's Estate*, 4 Pa. Dist. R. 265; *Lang v. Howell* (Surr.) 21 N. Y. Supp. 102.



## CHAPTER XIX.

### DISTRIBUTION OF INTESTATE ESTATES.

- 163. Order of Distribution.
- 164. Surviving Husband.
- 165. Widow.
- 166-167. Next of Kin.
- 168-169. Right of Representation.
- 170. Time of Distribution.
- 171. Mode of Distribution.
- 172. Payment of Distributive Share.

### ORDER OF DISTRIBUTION.

163. After the payment of debts, the duty of the administrator in cases of intestacy is to distribute the estate among those entitled to it by law. The persons to whom and shares in which the estate shall be distributed are regulated by statute in all the states. The various statutes of distribution of the different states have considerable similarity in their more important and typical provisions, and are given in following sections.

The rule of the statutes is to allow the property to go to the surviving husband or wife and next of kin.<sup>1</sup> It has already been seen that in ascertaining the next of kin the degrees of kindred shall be computed, in most of the United States, according to civil law.<sup>2</sup>

### SURVIVING HUSBAND.

164. The distributive share of a husband in the personal estate of his deceased wife depends upon the statute of the state of the husband's domicile. At common law the husband was entitled to all the personal

<sup>1</sup> See Abb. Desc. Wills & Adm. § 1.

<sup>2</sup> See ante, p. —, c. 5.

property of the wife by survivorship; and this title is not divested by the statutes which allow married women to hold their property separately from their husbands, and as if sole, unless the statute expressly so states, but may be, and generally is, altered by statutes of distribution which regulate the manner in which the estate is to be divided.

The right of the husband, in case of the death of his wife, to all her personal estate by right of being her husband, so far as it was in his possession, and to have administration in order that he might reduce the choses in action into his possession, has been already examined.<sup>3</sup> This right is not affected by statutes which merely permit married women to hold as their own separate estate property which comes to them by gift, devise, or bequest, or which they earn; and in such a case, in default of other statutory provision, the right of the husband by survivorship exists as at common law. But in most states the statutes of distribution expressly mark out the course in which the personal property of a deceased person is to go; and in this case, if the husband's right is omitted, it is lost.\*

The husband's rights, as fixed by the statutes of distribution of the various states, are as follows: In Alabama he takes half the personalty if there are any of her next of kin alive. If none, he

<sup>3</sup> Ante, p. 236, c. 14; Id., p. 59, c. 5. *Albee v. Carpenter*, 12 Cush. (Mass.) 386. See Abb. Desc. Wills & Adm. § 165.

<sup>4</sup> *Barnes v. Underwood*, 47 N. Y. 351; *Ransom v. Nichols*, 22 N. Y. 110. The husband's right to the personal property of his wife may be lost by her making a will by which it is bequeathed to some other person, in states where married women are allowed to make wills. In Massachusetts this right of the wife is limited to one-half of her personal estate, the other half of which necessarily goes to the husband. *Hardy v. Smith*, 136 Mass. 328; Pub. St. c. 147, § 6. If she makes a will leaving more than this portion away from him, her estate is considered intestate as to the excess over the portion which she might lawfully leave away from him. *Marshall v. Berry*, 13 Allen (Mass.) 45, 46. Cf. post, —. A further limitation of the right of the husband is provided by statute in Massachusetts, which enacts that a married woman living apart from her husband for cause, or deserted by him, when these facts have been established by a proper decree of court, under a statute of that state, may make a valid will as if sole, and, without her husband's assent, may dispose of all her estate. St. 1884, c. 301.

takes all.<sup>5</sup> In Arkansas his rights by statute are to take all in case of failure of all her kindred.<sup>6</sup> In California the husband takes one-third, if there is more than one child, or one child and the issue of another, or more; if there is only one child or its lawful issue, he takes one-half; and, if no issue, he takes one-half, the other half going to the father and mother, or the brothers and sisters; if there is neither issue, father, mother, brother, nor sister, he takes the whole.<sup>7</sup> In Colorado he takes half with the children, and, if there are none, he takes all.<sup>8</sup> In Connecticut he takes, if the marriage took place after April, 1877, one-third when there are issue, and one-half when there are no issue; but no more in any event.<sup>9</sup> In Delaware he takes all.<sup>10</sup> In Florida he shares with children and their descendants, and, if there are none, he takes all.<sup>11</sup> In Georgia he takes all, except as to her separate estate, which he shares with the children, if any.<sup>12</sup> In Illinois the husband takes one-third if there are children or their issue; if there are none, he takes the whole.<sup>13</sup> In Indiana the husband takes the same share of his wife's separate personal estate that he does in her real estate, i. e. one-third.<sup>14</sup> If there are no children, but a parent or parents, the husband takes three-fourths, and the surviving parent or parents one-fourth; but the husband takes all up to \$1,000.<sup>15</sup> If there is neither child nor parent, the husband takes the whole.<sup>16</sup> In Iowa the husband is postponed to the issue, but, if there is no issue, he takes one-half; the parents, or, if they are dead, their heirs, taking the other; and, if there are no parents or their heirs, the husband takes the whole; or, if he is dead, his heirs take the whole, sharing one-half with the heirs of any former husband.<sup>17</sup> In Kansas the husband takes the whole estate if there is no issue. If there is any issue, it is preferred to the husband.<sup>18</sup> In Kentucky he takes all.<sup>19</sup> In Maine he takes only one-

<sup>5</sup> Code, §§ 1915, 2353.

<sup>6</sup> Sand. & H. Dig. 1894, § 2476.

<sup>7</sup> Civ. Code (Deering) § 1386.

<sup>8</sup> Mills' Ann. St. § 1524.

<sup>9</sup> Gen. St. § 623.

<sup>10</sup> Rev. Code, p. 678.

<sup>11</sup> Rev. St. § 1820.

<sup>12</sup> Code, § 2484.

<sup>13</sup> Ann. St. (Coth.) p. 541, § 1.

<sup>14</sup> Rev. St. 1881, § 2488.

<sup>15</sup> Rev. St. 1881, § 2489.

<sup>16</sup> Rev. St. 1881, § 2490.

<sup>17</sup> Rev. Code, §§ 2440, 2455-2458.

<sup>18</sup> Gen. St. pars. 2611, 2619.

<sup>19</sup> St. § 1403.

third if there are issue; if there are no issue, but kindred, one-half;<sup>20</sup> and the whole only where there are no kindred. In Maryland the husband takes the whole personal estate absolutely if his deceased wife left no children. If she left children, he takes a life estate;<sup>21</sup> and this estate of the husband in his wife's property includes choses in action as well as in possession; and, even after he has reduced the choses in action to possession, he has only a life interest in them, if there are children.<sup>22</sup> In Massachusetts he takes the whole of his wife's property only when she leaves no issue. If she leaves issue, they take one-half and the husband the other half.<sup>23</sup> In Michigan the husband takes one-third, if there are children or issue, except that, if there is only one child, or the issue of one child, the husband takes one-half; if there is no issue, he takes one-half; and, if there is no issue, father, mother, brother, sister, or their issue, he takes the whole.<sup>24</sup> In Minnesota he takes one-third if there are issue, and all if there are none.<sup>25</sup> In Mississippi he takes a child's share if there are any children or their issue; if none, he takes all.<sup>26</sup> In Missouri he takes all in default of children or their issue, father, mother, brothers, sisters, and their descendants.<sup>27</sup> In New Hampshire the husband takes one-third if there is a child, or any issue of a child; if there is none, he takes one-half.<sup>28</sup> In New Jersey the rights of the husband at common law are preserved by the statute, and he takes the whole estate.<sup>29</sup> In New York the surviving husband takes one-third if there are children or their representatives surviving the deceased; if none, it seems that his common-law rights prevail, in the absence of any statute on the subject, and he takes the whole by survivorship.<sup>30</sup>

<sup>20</sup> Rev. St. c. 75, § 9.

<sup>21</sup> Rev. Code, art. 51, § 20.

<sup>22</sup> *Engel v. State*, 5 Atl. 249; 65 Md. 546.

<sup>23</sup> Pub. St. c. 135, § 3, cl. 3: St. 1882, c. 141.

<sup>24</sup> How. Ann. St. § 5847.

<sup>25</sup> St. § 4471.

<sup>26</sup> Code, § 1545.

<sup>27</sup> Rev. St. § 4465.

<sup>28</sup> Pub. St. c. 195, § 12.

<sup>29</sup> Revision, "Orphans' Courts," § 148.

<sup>30</sup> 3 Rev. St. (7th Ed.) p. 2303, § 75; *Id.* p. 2305, § 79; *Robins v. McClure*, 3 N. E. 663, 100 N. Y. 328; *Ransom v. Nichols*, 22 N. Y. 110; *Barnes v. Underwood*, 47 N. Y. 351.

In North Carolina he takes all.<sup>31</sup> In Ohio it seems that the common-law rights of the husband to his wife's property are modified by statute, and he takes her personal property only in case there are no children or their issue, in which case he takes the whole.<sup>32</sup> In Oregon he takes all.<sup>33</sup> In Pennsylvania a distinction is made between the estate which a woman holds as her separate estate and that which is governed by the rules of the common law. The husband takes the whole of the latter, while of the former he takes the whole only when there are no children. If there is a child or children, the husband divides with the children, share and share alike.<sup>34</sup> In Rhode Island he takes the whole of her property as at common law;<sup>35</sup> and by statute, if there are no kindred of the wife, if he is dead, his kindred take the property as if it were his.<sup>36</sup> In South Carolina the husband takes one-third if there are issue; if none, one-half, except in cases where there is no issue, father, mother, brother, sister, or their descendants or lineal ancestor, in which case he takes two-thirds; and, if there are no kindred, he takes the whole.<sup>37</sup> In Tennessee he takes all.<sup>38</sup> In Texas he takes one-third if there are issue; if none, he takes all.<sup>39</sup> In Vermont, if there are kindred and no issue, he takes all up to \$2,000, and one-half of the remainder; if no kindred, the whole; if there are issue, he takes nothing.<sup>40</sup> In Virginia the husband takes the whole personal estate without regard to the next of kin; but, if there are none, and he is dead, his kindred take the estate as if he had survived the wife.<sup>41</sup> In West Virginia he takes one-third if there are children; if none, he takes all.<sup>42</sup> In Wisconsin he takes all if there are no issue, being postponed to them.<sup>43</sup>

<sup>31</sup> Code, § 1479.

<sup>32</sup> Rev. St. §§ 4159, 4163; *Steel v. Kurtz*, 28 Ohio St. 197; *Curry v. Fulkinson's Ex'rs*, 14 Ohio, 100.

<sup>33</sup> Hill's Ann. Laws, § 3099.

<sup>34</sup> Brightly, *Purd. Dig. "Intestates,"* §§ 4, 5.

<sup>35</sup> Gen. Laws, c. 194, § 9.

<sup>36</sup> Gen. Laws, c. 216, § 4.

<sup>37</sup> Gen. St. § 1845.

<sup>38</sup> *Hays v. Bright*, 11 Heisk. 325.

<sup>39</sup> Rev. St. 1879, art. 1646.

<sup>40</sup> Rev. Laws, § 2230.

<sup>41</sup> Code, §§ 2548, 2557.

<sup>42</sup> Code, c. 78, § 9.

<sup>43</sup> Rev. St. § 2270.

## WIDOW.

165. The right of the widow in the personal estate of her deceased husband as distributee is regulated by statute in the various states as follows:

In Alabama, if there are no children, the widow takes all the personal estate. If there is one child, she takes a half. If there is more than one but less than four children, she takes a child's part. If there are more than four children she takes a fifth; and, on failure of all kindred of the husband, she takes all.<sup>44</sup> In Arkansas the only statutory provision is that on failure of all his kindred, she takes all.<sup>45</sup> In California the rights of the widow are the same as those of a surviving husband, q. v.<sup>46</sup> In Colorado her rights are the same as her husband's, q. v.<sup>47</sup> In Connecticut she takes one-third if there are issue; one-half if there are none.<sup>48</sup> In Delaware she takes one-third if there are issue, one-half if there are no issue, but other kin, and all if no kin.<sup>49</sup> In Florida her rights are the same as her husband's.<sup>50</sup> In Georgia she takes all if there are no lineal descendants; if there are children, she shares with them, if there are five or less; if there are more, she takes a fifth.<sup>51</sup> In Illinois the widow takes one-third if there are children or their descendants; if none, she takes the whole.<sup>52</sup> In Indiana, if there are one or two children, the widow takes equally with the child or children; if there are more than two children, the same method of division holds, except that the widow's share shall not be reduced below one-third of the whole estate.<sup>53</sup> If there is no child, the widow takes three-fourths, and the parent or parents one-fourth, but she takes all up to \$1,000;<sup>54</sup> if there is no parent or child, the widow takes the whole.<sup>55</sup> In Iowa the rights of the widow are the same as those of a surviving husband, q. v.<sup>56</sup> In Kansas she takes one-half unless there is no issue,

<sup>44</sup> Code, §§ 1915, 1924.

<sup>45</sup> Sand. & H. Dig. § 2476.

<sup>46</sup> Supra, note 7.

<sup>47</sup> Supra, note 8.

<sup>48</sup> Gen. St. § 623.

<sup>49</sup> Rev. Code, p. 678.

<sup>50</sup> Supra, note 11.

<sup>51</sup> Code, §§ 1762, 2484.

<sup>52</sup> Rev. St. (Coth.) p. 541, § 1.

<sup>53</sup> Rev. St. 1881, § 2487.

<sup>54</sup> Rev. St. 1881, § 2489.

<sup>55</sup> Rev. St. 1881, § 2490.

<sup>56</sup> Supra, note 17.

in which case she takes the whole.<sup>57</sup> In Kentucky she takes one-third if there are issue, and one-half if there are none.<sup>58</sup> In Maine the widow's rights are the same as her husband's.<sup>59</sup> In Maryland the widow takes one-third if there is a child or descendants of a child; one-half if there is no issue, but a father, mother, brother, or sister, or child of a deceased brother or sister; and, if none of these, the whole.<sup>60</sup> In Massachusetts if there are issue, the widow takes one-third of the personal estate as distributee.<sup>61</sup> If there are no issue, but there are kindred, the widow takes property up to \$5,000 in value, and one-half the excess over \$10,000; and if no kindred she takes the whole.<sup>62</sup> In Michigan the widow takes one-third if there are issue, except that she takes one-half if there is only one child or the issue of one child; if no issue, she takes all up to \$1,000, and, if the estate exceeds that sum, she takes one-half, unless there is no issue, father, mother, brother, sister or their issue, in which case she takes the whole.<sup>63</sup> In Minnesota she takes one-third if there are issue, and all if there are none.<sup>64</sup> In Mississippi she takes a child's part if there are any children or issue; if none, she takes all.<sup>65</sup> In Missouri she takes all in default of children and their descendants, father, mother, brothers, sisters, and their descendants.<sup>66</sup> In Nebraska she takes a child's share if there are any children or their issue; if there are none, she takes all for life; if there are no kin, she takes all absolutely.<sup>67</sup> In New Hampshire the widow takes one-third when there is a child or the issue of a child, and one-half when there is none.<sup>68</sup> In New Jersey the widow takes one-third of the personal estate if there are children or their issue, and, if there are none, one-half.<sup>69</sup> In New York the widow takes one-third if there are children or their representatives; if none, she takes at least one-half the estate, with this addition: that if there is no descendant or parent, but there is a brother or sister, nephew or niece, she takes, besides her half, as much of the rest of the estate (all, if necessary)

<sup>57</sup> Gen. St. pars. 2599, 2611, 2622.

<sup>58</sup> St. § 1403.

<sup>59</sup> Rev. St. § 9. See ante, p. 375.

<sup>60</sup> Rev. Code, art. 48, §§ 2-4.

<sup>61</sup> Pub. St. c. 135, § 3, cl. 4; Id. c. 128, § 6.

<sup>62</sup> Pub. St. c. 135, § 3, cl. 5; St. 1885, c. 276.

<sup>63</sup> How. Ann. St. § 5847.

<sup>64</sup> Gen. St. § 4471.

<sup>65</sup> Code, § 1545.

<sup>66</sup> Rev. St. § 4465.

<sup>67</sup> Comp. St. 1893, c. 23, § 176.

<sup>68</sup> Pub. St. c. 195, § 10.

<sup>69</sup> Revision, "Orphans' Courts," § 147.

as will make \$2,000; if there is no parent or descendant, brother or sister, nephew or niece, she takes the whole personal estate.<sup>70</sup> In North Carolina, if there are one or two children, she takes a third; if there are more than two, she takes a child's part; if there are no children or their issue, she takes a half.<sup>71</sup> In Ohio the widow is apparently entitled, if there is a surviving child, to one-half of the personal estate up to \$400, and one-third of the residue; if there is no surviving child or descendant, she takes the whole.<sup>72</sup> In Oregon she takes all if there are no issue; one-half if there are issue.<sup>73</sup> In Pennsylvania the widow takes one-third if there is issue; if none, but there are other kindred, she takes one-half; if no kindred, she takes the whole.<sup>74</sup> In Rhode Island she takes one-third if there is issue, and one-half when there is none;<sup>75</sup> and, if there are no kindred, she takes the whole; and, if she is dead, her kindred take as if she had survived her husband, and thus become entitled to the estate.<sup>76</sup> In South Carolina the widow takes the same share as the surviving husband, which has been already stated.<sup>77</sup> In Tennessee she shares with the children, taking a child's part. If there are no issue, she takes all.<sup>78</sup> In Texas she takes one-third if there are issue; if none, all.<sup>79</sup> In Vermont, if there are kindred, and no issue, she takes all up to \$2,000, and one-half of the remainder; if there are no kindred, she takes the whole; if there are issue, she takes nothing.<sup>80</sup> In Virginia she takes one-third if there is issue by her; if no issue by her, she takes all the property which was hers before marriage, and remains in kind; also one-third of the rest if there is issue by a former marriage; if none, one-half; if there are no kindred, the whole, and, if she is dead in such case, her kindred take as if she had survived the deceased.<sup>81</sup> In West Virginia she takes one-third if there are children; if none, she takes all.<sup>82</sup> In Wisconsin she takes a child's share if there are issue; if none, she takes all.<sup>83</sup> If the widow, in pursuance of a right which is allowed

<sup>70</sup> 3 Rev. St. (7th Ed.) p. 2303, § 75.

<sup>71</sup> Code, § 1478.

<sup>72</sup> Rev. St. §§ 4159, 4163, 6194.

<sup>73</sup> Hill's Ann. Laws, § 3099.

<sup>74</sup> Brightly, Purd. Dig. "Intestates," §§ 2, 3, 28.

<sup>75</sup> Gen. Laws, c. 216, § 9.

<sup>76</sup> Gen. Laws, c. 216, § 4.

<sup>77</sup> Ante, p. 377.

<sup>78</sup> Code, § 3278.

<sup>79</sup> Rev. St. (1879) art. 1646.

<sup>80</sup> R. L. § 2230.

<sup>81</sup> Code, §§ 2548, 2557.

<sup>82</sup> Code, c. 78, § 9.

<sup>83</sup> Rev. St. §§ 2270, 3935.



her by statute in some states, elects not to take the provision made for her by her husband's will, she takes the same share in his estate which she would have taken if he had died intestate;<sup>84</sup> but the rest of the estate is distributed according to the will.<sup>85</sup> The widow is not barred in the probate court of her right to her distributive share of her deceased husband's estate by an antenuptial agreement, whereby she agreed that the provision made for her in the settlement should bar every claim of hers against his estate; but this agreement will be enforced in equity, and will bar her right.<sup>86</sup> An acceptance by her of a provision of the will in place of her dower does not affect her right to a distributive share in case of partial intestacy.<sup>87</sup> She takes her distributive share as well in cases of partial as of total intestacy; for example, if a legacy has lapsed, and does not fall into the residue.<sup>88</sup>

#### NEXT OF KIN.

166. The distribution of intestate estates among the next of kin is regulated with great detail in most of the United States. The various degrees of relationship entitle the relatives to various shares in the estate. The order in which distribution is regulated in the various states is given below. In every case it is to be understood that the statements as to the distribution of the estate are subject to such rights of the surviving husband or widow as have been previously stated.

167. The subject will be considered as follows:

- (a) Statutory provisions of the several states.
- (b) Escheat.
- (c) Half and whole blood.
- (d) Kindred on paternal and maternal sides.

<sup>84</sup> Anderson's Appeal, 36 Pa. St. 476; Gallagher's Estate, 76 Pa. St. 296.

<sup>85</sup> Heineman's Appeal, 92 Pa. St. 95.

<sup>86</sup> Sullings v. Richmond, 5 Allen (Mass.) 192.

<sup>87</sup> Hand v. Marcy, 28 N. J. Eq. 65; Darrah v. M'Nair, 1 Ashm. (Pa.) 236.

<sup>88</sup> Skellenger's Ex'rs v. Skellenger's Ex'r, 32 N. J. Eq. 662; Reed's Estate, 82 Pa. St. 430. Cf *infra*, p. 397.

- (e) **Illegitimate children.**
- (f) **Adopted children.**
- (g) **Posthumous children.**
- (h) **Right of representation.**

**ALABAMA.** Personal property goes, in this state, first, to children or their descendants; second, to the parents, and, if there is only one parent, one-half to the parent and one-half to the brothers and sisters, and, if there are no brothers and sisters, all to the surviving parent; third, if there is no surviving parent, to the brothers and sisters; fourth, to the next of kin in equal degree; fifth, to the husband or wife; sixth, to the state by escheat.<sup>89</sup>

**ARKANSAS.** In this state, personal estate goes, first, to children and their descendants; second, to father; third, to mother; fourth, to brothers and sisters or their descendants; fifth, to grandfather; sixth, to grandmother; seventh, to uncles and aunts or their descendants; and, eighth, to the nearest lineal ancestor and his children and their descendants.<sup>90</sup>

**CALIFORNIA.** Personal estates goes, first, to children and their descendants; second, to father and mother or either; third, to brothers and sisters and their descendants; fourth, to the next of kin, preferring those who claim through the nearest ancestor.<sup>91</sup>

**COLORADO.** In this state the order is the same as in Arkansas.<sup>92</sup>

**CONNECTICUT.** In this state personal estate goes, first, to children and their descendants; second, to brothers and sisters of the whole blood, and their descendants; third, to parent or parents; fourth, to brothers and sisters of the half blood; fifth, to the next of kin.<sup>93</sup>

**DELAWARE.** Personal estate goes, first, to children and their issue; second, to brothers and sisters of the whole blood and their issue; third, to father; fourth, to mother; fifth, to the next of kin and their issue.<sup>94</sup>

**FLORIDA.** Personal estate goes, first, to children and their descendants; second, to father; third, to mother, brothers and sis-

<sup>89</sup> Code, §§ 1924, 1915; Acts 1890, c. 121.

<sup>92</sup> Mills' Ann. St. § 1524.

<sup>90</sup> Sand. & H. Dig. § 2470.

<sup>93</sup> Gen. St. §§ 630, 632.

<sup>91</sup> Civ. Code, § 1386.

<sup>94</sup> Rev. Code, p. 678.

ters, and their descendants. If there are none of the foregoing, the estate is divided into halves, one-half going to the paternal kindred and one-half to the maternal kindred in the following order: First, grandfather; second, grandmother, uncles and aunts and their descendants; third, great-grandfather; fourth, great-grandmother and her brothers and sisters and their descendants.<sup>95</sup>

GEORGIA. Personal estate goes, first, to children and their descendants; second, to brothers and sisters and their children and grandchildren by right of representation, but no further; third, father, if surviving, takes equally with brothers and sisters; fourth, mother the same; fifth, first cousins, uncles, and aunts; sixth, other kin, computed according to the rules of the canon law.<sup>96</sup>

ILLINOIS. Personal estate goes, first, to children and their descendants; second, parents, brothers and sisters and their descendants,—to each parent a child's part, and to the survivor a double portion; third, if there is no parent, brothers and sisters and their descendants, then to the next of kin in equal degree by the rules of civil law; fourth, escheat to the state.<sup>97</sup>

INDIANA. Personal estate goes, first, to children and their descendants; second, one-half to father and mother or the survivor, and one-half to brothers and sisters and their descendants; third, if no father and mother, all to the brothers and sisters and their descendants; fourth, if no brothers and sisters, to the father or mother or the survivor. On failure of all the above, if the estate came from the paternal line, it goes, first, to paternal grandfather, grandmother, or the survivor, then to paternal uncles and aunts and their descendants, then to the paternal next of kin, then to the maternal kindred in the same course. If the estate did not come from either paternal or maternal kindred, it is divided into two parts, and one-half goes to each in the above course. Fifth, escheat to the state.<sup>98</sup>

IOWA. Personal estate goes, first, to children and their descendants; second, half to parents, half to wife, and, if no wife, all to parents, and, if only one parent, he takes both shares; third, if both parents are dead, the estate is distributed in the same man-

<sup>95</sup> Rev. St. § 1820.

<sup>97</sup> Ann. St. (Coth.) p. 541, § 1.

<sup>96</sup> Code, § 2484.

<sup>98</sup> Rev. St. 1881, §§ 2467-2471.

ner as if they had outlived the intestate, and were in possession of the estate, and so on, through the ascending ancestors and their issue.<sup>99</sup>

**KANSAS.** Personal estate goes first, one-half to the wife or husband surviving, and one-half to children and their descendants; second, if there are no issue, to the wife or husband surviving; third, to parents or the survivor; fourth, in default of the above, the estate goes as if the parents had survived the intestate, and were in possession of the estate, and so on through ascending ancestors and their issue.<sup>100</sup>

**KENTUCKY.** Personal estate goes, first, to children and their descendants; second, to the father and mother, or survivor; third, to brothers and sisters and their descendants. In default of the above, one-half to paternal kindred and one-half to maternal kindred in the following course: First, grandfather and grandmother, or either; second, uncles and aunts and their descendants; third, great-grandfather and great-grandmother; fourth, brothers and sisters of great-grandfather and great-grandmother and their descendants. If there are no kin of one line, all goes to the other. If neither, all goes to the husband or wife surviving, or his or her heirs, as if he or she had survived the intestate, and had died entitled to the estate.<sup>101</sup>

**MAINE.** Personal estate goes, first, to children and their descendants, equally, if in the same degree, otherwise by right of representation; second, to father; third, to mother, brothers and sisters and their children and grandchildren; fourth, to the mother, excluding issue of brothers and sisters; fifth, next of kin, preferring those who claim through the nearest ancestor.<sup>102</sup>

**MARYLAND.** Personal estate goes, first, to children and their descendants; second, to father; third, to brothers and sisters and their descendants; fourth, to mother, but she shares equally with brothers and sisters if there is no father; fifth, to collaterals in equal degree; sixth, to grandfather, who may take if there are no collateral kindred, and, on his death, to grandmother.<sup>103</sup>

**MASSACHUSETTS.** Personal estate goes, first, to children and their descendants, if all are in the same degree, equally, otherwise

<sup>99</sup> Rev. Code (Miller) §§ 2453-2458.

<sup>102</sup> Rev. St. c. 75, § 1.

<sup>100</sup> Gen. St. pars. 2599, 2609, 2619, 2622. <sup>103</sup> Rev. Code, art. 48, §§ 5-13.

<sup>101</sup> St. § 1393.

by right of representation; second, to father and mother or the survivor of them; third, to brothers and sisters and their descendants, if all are in the same degree, equally, otherwise by right of representation; fourth, next of kin in equal degree, preferring in each case those claiming through the nearest ancestor.<sup>104</sup>

MICHIGAN. Personal estate goes, first, to children and their descendants; second, to father; third, to mother, brothers and sisters and their descendants; fourth, to next of kin.<sup>105</sup>

MINNESOTA. Personal estate goes, first, to children and their issue by right of representation; second, to husband or wife; third, to father; fourth, to mother; fifth, to brothers and sisters and their issue by right of representation; sixth, to next of kin in equal degree, preferring those claiming through nearer ancestor.<sup>106</sup>

MISSISSIPPI. Personal estate goes, first, to children and their descendants; second, to brothers and sisters and their descendants; third, to father; fourth, to mother, or both; fifth, to next of kin computed by the civil law.<sup>107</sup>

MISSOURI. Personal estate goes, first, to children and their descendants; second, to father, mother, brothers and sisters and their descendants, in equal parts; third, to husband or wife; fourth, to grandfather, grandmother, uncles, aunts, and their descendants, in equal parts; fifth, to great-grandfather, great-grandmother, and their descendants, in equal parts; and so on to the nearest lineal ancestors and their descendants, in equal parts.<sup>108</sup>

NEBRASKA. Personal estate goes, first, to children and their issue by right of representation; second, to the widow for life, and remainder to the father; third, to father; fourth, to brothers and sisters and their children by right of representation, but the mother shares with them if living; fifth, to mother, excluding issue of deceased brothers and sisters; sixth, to next of kin, preferring those claiming through the nearest lineal ancestor; seventh, if there is a widow and no kindred, she takes all.<sup>109</sup>

<sup>104</sup> Pub. St. c. 125, § 1; Id., c. 135, § 3.

<sup>105</sup> 2 How. Ann. St. § 5847; 3 How. Ann. St. 5772a.

<sup>106</sup> Gen. St. 1894, § 4471.

<sup>107</sup> Code, §§ 1543, 1547.

<sup>108</sup> Rev. St. § 4465.

<sup>109</sup> Comp. St. 1893, c. 23, §§ 176, 30.

**NEW HAMPSHIRE.** Personal estate goes, first, to children and legal representatives; second, to father; third, to mother, brothers and sisters and their representatives; fourth, to next of kin.<sup>110</sup>

**NEW JERSEY.** Personal estate goes, first, to children and their representatives; second, one-half to widow and one-half to next of kin in equal degree; third, if there is no widow, all to the children and their representatives; fourth, to the next of kin and their representatives.<sup>111</sup>

**NEW YORK.** First. One-third to the widow, and the residue in equal portions to the children, and the persons legally representing such children as are deceased. Second. If there be no children or legal representatives of them, one moiety of the whole surplus goes to the widow, and the other moiety to the next of kin. Third. If there be a widow and no descendant, parent, brother or sister, nephew or niece, the widow takes the whole surplus, but, if there be a brother or sister, nephew or niece, and no descendant or parent, the widow takes a moiety of the surplus as above stated, and the whole of the residue, where it does not exceed \$2,000; if it exceeds that sum, she takes, in addition to her moiety, \$2,000, and the remainder is distributed to the brothers and sisters and their representatives. Fourth. If there be no widow, the whole surplus goes equally to the children and such as legally represent them. Fifth. If there be no widow, and no children, nor representatives of children, the whole surplus goes to the next of kin in equal degree to the deceased and their legal representatives. Sixth, if there be no children, nor representatives of them, nor father, the moiety not given to the widow goes in equal shares to the mother, if surviving, and the brothers and sisters and their representatives; if there be no widow, the whole surplus is distributed in like manner to the mother and to brothers and sisters or the representatives of such brothers and sisters. Seventh. If deceased leave a father, and no child or descendant, father takes a moiety if there be a widow, and the whole if there be no widow. Eighth. If deceased leave a mother and no child, descendant, father, brother or sister, or representative of the brother or sister,

<sup>110</sup> Pub. St. c. 196, § 1.

<sup>111</sup> Revision, "Orphans' Courts," § 147.

mother takes a moiety if there be a widow, and the whole if there be no widow.<sup>112</sup>

**NORTH CAROLINA.** Personal estate goes, first, to children and their representatives; second, half to the widow and half to the next of kin in equal degrees, and those who represent them.<sup>113</sup>

**OHIO.** Personal estate goes, first, to children and their representatives; second, to husband and wife; third, to brothers and sisters of the whole blood and their representatives; fourth, to brothers and sisters of the half blood and their representatives; fifth, to father; sixth, to mother; seventh, to next of kin.<sup>114</sup>

**OREGON.** Personal estate goes, first, to children and their issue by right of representation; second, to wife and father; third, to mother, brothers and sisters and their issue, by right of representation, but, if no brothers and sisters, mother takes, excluding issue of brothers and sisters; fifth, to next of kin, preferring those that claim through the nearest ancestor.<sup>115</sup>

**PENNSYLVANIA.** Personal estate goes, first, to children and grandchildren by right of representation; second, to father and mother or their survivor; third, to collateral heirs as follows: (a) Brothers and sisters of the whole blood; (b) uncles and aunts; (c) descendants of brothers and sisters; fourth, to next of kin.<sup>116</sup>

**RHODE ISLAND.** Personal estate goes, first, to children and their descendants; second, to father; third, to mother, brothers and sisters and their descendants. In default of these, it is divided into two shares, one going to the paternal and one to the maternal kindred as follows: (1) Grandfather; (2) grandmother, uncles and aunts and their descendants; (3) great-grandfather or fathers; (4) great-grandmother or mothers, and brothers and sisters of grandfather and grandmother, and their descendants; (5) and so on to nearest lineal male ancestors, and then female ancestors, and descendants.<sup>117</sup>

**SOUTH CAROLINA.** Personal estate goes, first, to children and their representatives; second, half to widow and half to father,

<sup>112</sup> 2 Rev. St. p. 96.

<sup>113</sup> Code, § 1478.

<sup>114</sup> Rev. St. § 4159.

<sup>115</sup> Hill's Ann. Laws, § 3098.

<sup>116</sup> Brightly, Purd. Dig. "Intestates," §§ 7-25.

<sup>117</sup> Gen. Laws, c. 216, §§ 1-3.

mother, brothers and sisters of the whole blood and their descendants; third, half to widow, half to brothers and sisters of the half blood, and children of brothers and sisters of the whole blood; fourth, half to widow and half to the lineal ancestor; fifth, two-thirds to widow and one-third to the next of kin; sixth, surviving wife or husband takes all.<sup>118</sup>

**TENNESSEE.** Personal estate goes, first, to children and their descendants; second, to widow; third, to father; fourth, to mother, brothers and sisters and their descendants by right of representation; fifth, to next of kin in equal degree.<sup>119</sup>

**TEXAS.** Personal estate goes, first, to children and their descendants; second, to father and mother; if only one of them, then half to brothers and sisters and their descendants; third, to brothers and sisters and their descendants. In default of the above, the property is divided into two moieties, one going to the paternal and one to the maternal kindred in the following course: grandfather and grandmother and their descendants by right of representation, and so on to the nearest lineal ancestor and his descendants.<sup>120</sup>

**VERMONT.** Personal estate goes, first, to children and their representatives; second, to husband or wife; third, to father and mother, or the survivor; fourth, to brothers and sisters and their descendants; fifth, to the next of kin in equal degree.<sup>121</sup>

**VIRGINIA.** In this state the order is the same as in Florida.<sup>122</sup>

**WEST VIRGINIA.** And in this state, also, the order is like that of Florida.<sup>123</sup>

**WISCONSIN.** Personal estate goes, first, to children and their issue by right of representation; second, to widow; third, to parents, or the survivor of them; fourth, to brothers and sisters and their descendants by right of representation; fifth, to next of kin, preferring those claiming through the nearest ancestor.<sup>124</sup>

<sup>118</sup> Gen. St. § 1845.

<sup>119</sup> Mill. & V. Code, § 3278.

<sup>120</sup> Rev. St. 1879, arts. 1645, 1646.

<sup>121</sup> St. § 2544.

<sup>122</sup> Code, §§ 2548, 2557.

<sup>123</sup> Code, c. 78, § 1.

<sup>124</sup> Rev. St. § 2270.



*Escheat.*

It is only in case of total lack of kindred or surviving husband or wife that the estate escheats to the commonwealth.<sup>125</sup>

*Half and Whole Blood.*

It is generally provided by statute that kindred of the half blood are on an equality with those of the whole blood,<sup>126</sup> and therefore the property will go to nearer relatives of the half blood in preference to more remote of the whole blood;<sup>127</sup> and kindred of the half blood take their distributive shares equally with those of the whole blood;<sup>128</sup> but in some states the whole blood is preferred to the half blood.<sup>129</sup>

*Kindred on Paternal and Maternal Sides.*

It has already been said that in most states now no difference is made between kindred on the paternal and maternal sides, although the statutes of each state must be consulted in order to ascertain what the law upon this point is in each particular state.<sup>130</sup>

*Illegitimate Children.*

The rights of illegitimate children are generally regulated by statute in the various states, by which various degrees of legitimacy are conferred upon them. In the absence of statutes, they have no right to any distributive share except from the estates of their descendants, who also may inherit from them. Therefore an illegitimate child cannot inherit from his mother unless by statute.<sup>131</sup>

<sup>125</sup> Cal. Civ. Code (Deering) § 1386; Me. Rev. St. c. 75, § 1; Mass. Pub. St. c. 135, § 3, cl. 6; Brightly, Purd. Pa. Dig. "Intestates," § 31. And see the statutes of each state, separatim.

<sup>126</sup> Cal. Civ. Code (Deering) § 1394 (except as to estates of descent, devise, or gift); Ill. Ann. St. (Starr & C.) c. 39, par. 1; Ind. Rev. St. § 2472; Kan. Comp. Laws, § 2267; Me. Rev. St. c. 75, § 2; Md. Rev. Code, art. 48, § 12; 3 Mich. Ann. St. § 5776a (except as to estates of descent, devise, or gift); N. Y. 3 Rev. St. (7th Ed.) p. 2304, § 75; Brightly, Purd. Pa. Dig. "Intestates," § 21; R. I. Pub. St. c. 187, § 9; Vt. R. L. § 2231.

<sup>127</sup> McCune's Appeal, 65 Pa. St. 450.

<sup>128</sup> Larrabee v. Tucker, 116 Mass. 562.

<sup>129</sup> Conn. Gen. St. § 632; Ohio, Rev. St. §§ 4159, 4163; S. C. Gen. St. § 1845; Va. Code, § 2549.

<sup>130</sup> Knapp v. Windsor, 6 Cush. (Mass.) 156; ante, p. 77, c. 5.

<sup>131</sup> Cooley v. Dewey, 4 Pick. (Mass.) 94.

But statutes exist in many states by which such a child inherits from and transmits to his mother and her kin as if he was her lawful child.<sup>132</sup> In Massachusetts, by statute, in the distribution of estates, an illegitimate child is considered the heir of his mother and of any maternal ancestor, and the lawful issue of an illegitimate person represents such person, and takes by descent any estate which such person would have taken if living. If an illegitimate child dies intestate and without issue who may lawfully inherit his estate, such estate descends to his mother. An illegitimate child whose parents have married, and whose father has acknowledged him as his child, is considered legitimate. A further statute provides that a divorce for adultery committed by the wife does not affect the legitimacy of the issue of the marriage, but the legitimacy, if questioned, must be tried and determined according to the course of the common law. Under these statutes it is held that a bastard cannot inherit through a legitimate child of the same mother, since the bastard can only inherit from his mother and her lineal ancestors;<sup>133</sup> but he may take a legacy from a legitimate child of the same mother, when he is described in the legacy as "my brother A."<sup>134</sup> In New Jersey the statute provides that if the mother of an illegitimate child dies, leaving no husband or lawful issue, her illegitimate child shall inherit, and that the personal property of any deceased illegitimate child who died unmarried and leaving no issue shall go to his mother.<sup>135</sup> In the same state it follows as a result of the statutes and the rule of common law that one cannot make a claim to a distributive share of a grandfather's estate through his illegitimate daughter. Thus, where a woman claimed a share in an estate of a deceased man on the ground that she was the daughter of a daughter of the intestate, her claim was successfully resisted by showing that

<sup>132</sup> Cal. Civ. Code, (Deering) §§ 1387, 1388; Ill. Ann. St. (Starr & C.) c. 39, par. 2; Ind. Rev. St. §§ 2474, 2477; Iowa Rev. Code, § 2465; Kan. Comp. Laws, § 2260; Me. Rev. St. c. 75, §§ 3, 4; Md. Rev. Code, art. 48, § 16; Mich. Ann. St. §§ 5773a, 5774a; N. H. Gen. Laws, c. 203, §§ 4, 5; N. Y. 3 Rev. St. (7th Ed.) p. 2304; Ohio Rev. St. § 4174; Brightly, *Purd. Pa. Dig.* "Intestates," § 40; Vt. R. L. § 2232; Va. Code, § 2552.

<sup>133</sup> *Haraden v. Larrabee*, 113 Mass. 432; *Pratt v. Atwood*, 108 Mass. 40.

<sup>134</sup> *Dane v. Walker*, 109 Mass. 180.

<sup>135</sup> Revision, "Orphans' Courts," § 147.

the mother of the claimant was an illegitimate daughter of the deceased, although her parents had afterwards intermarried, and she had always been treated as if she were the legitimate daughter of the deceased.<sup>136</sup> In many states a child is legitimized if the parents afterwards intermarry, and recognize the child;<sup>137</sup> or if the father acknowledges the child to be his in some formal manner, as in writing,<sup>138</sup> in which case he inherits as if legitimate; but in some states the mother inherits from him in preference to the father.<sup>139</sup>

### *Adopted Children.*

The rights of adopted children are wholly the creation of the statutes, and the respective statutes of each state must be referred to to find what these rights may be. In most states a child regularly adopted is given all the rights of inheritance which belong to a child by birth, except, in some states, of inheritance of estates tail, or of collateral inheritance by representation.<sup>140</sup> But in New York, such right is expressly denied to the adopted child.<sup>141</sup> An adopted child has been held to take under a trust for the benefit of the child or children of R., which also contained a bequest over in case said R. died without leaving any lawful issue.<sup>142</sup>

### *Posthumous Children.*

It is sometimes enacted by statutes that posthumous children shall be considered as alive at the death of their father.<sup>143</sup> In some states

<sup>136</sup> *Bussom v. Forsyth*, 32 N. J. Eq. 277.

<sup>137</sup> Cal. Civ. Code (Deering) § 1387; Conn. Gen. St. § 630; Ill. Ann. St. (Starr & C.) c. 39, par. 3; Ind. Rev. St. 1881, § 2476; Me. Rev. St. c. 75, § 3; Mich. 2 Ann. St. § 5775a; Ohio Rev. St. § 4175; Va. Code, § 2553.

<sup>138</sup> Cal. Civ. Code (Deering) § 1387; Kan. Comp. Laws, §§ 2261, 2262; Iowa, Rev. Code, § 2466; Me. Rev. St. c. 75, § 3; Mich. 2 Ann. St. § 5775a.

<sup>139</sup> See statutes above cited.

<sup>140</sup> Cal. Civ. Code (Deering) §§ 228, 229; Conn. Gen. St. § 472; Ill. Ann. St. (Starr & C.) c. 4, par. 5; Ind. Rev. St. 1881, § 825; Iowa Rev. Code (Miller) § 2310; Kan. Comp. Laws, § 3482; Me. Rev. St. c. 67, § 35; Mass. Pub. St. c. 148; Mich. Ann. St. § 6379; N. H. Gen. Laws, c. 188, § 4; N. J. Supp. Revision, "Infants," § 2; Brightly, *Purd. Pa. Dig. "Adoption,"* § 1; R. I. Pub. St. c. 164, § 7.

<sup>141</sup> N. Y. 3 Rev. St. (7th Ed.) p. 2342, § 10.

<sup>142</sup> *Sewall v. Roberts*, 115 Mass. 276. See Abb. Desc. Wills & Adm. § 4.

<sup>143</sup> Ill. Ann. St. (Starr & C.) c. 39, par. 9; Kan. Comp. Laws, § 2268; Mass. Pub. St. c. 125, § 6; N. Y. 3 Rev. St. (7th Ed.) p. 2304, § 75, cl. 13; Brightly,

this is true only of children of the person whose estate is under settlement.<sup>144</sup>

#### SAME—RIGHT OF REPRESENTATION.

168. At common law, where the personal property went to the next of kin in equal degree, there would be no share for the issue of deceased next of kin.

169. In many states there are now statutes which confer a right upon various relatives of the deceased to represent their deceased parents or ancestors, and take their share of the estate. This mode of transmission of property is called "transmission by right of representation," and this right is defined to be when the descendants of a deceased heir take the same right or share in the estate of another person that their parent would have taken if living.

The right of representation is very generally granted in case of the issue of deceased children of the intestate.<sup>145</sup> It is also generally granted to the issue of children of deceased brothers or sisters, and less often to all the issue of deceased brothers or sisters,<sup>146</sup> and it is rarely granted to others of the kindred.<sup>147</sup> In some states it is denied in all cases of collateral kindred.<sup>148</sup> In Pennsylvania the right of representation extends to grandchildren of deceased brothers or sisters and to children of deceased uncles or aunts, and, except in these cases, and the direct issue of the deceased, those who are in equal degree take the whole estate, excluding those who are more remote.<sup>149</sup> By a recent statute of

Purd. Pa. Dig. "Intestates," § 32; S. C. Gen. St. § 1846. See Abb. Desc. Wills & Adm. § 2.

<sup>144</sup> Ind. Rev. St. 1881, § 2467; Md. Rev. Code, art. 48, § 15; Ohio Rev. St. § 4179; R. I. Pub. St. c. 187, § 3; Va. Code, § 2555.

<sup>145</sup> See the following statutes passim.

<sup>146</sup> N. H. Gen. Laws, c. 203, § 3; Davis v. Vanderveer's Adm'r, 23 N. J. Eq. 558; Davis v. Stinson, 53 Me. 495; Mich. Ann. St. § 5772a.

<sup>147</sup> Post, p. 394.

<sup>148</sup> Vt. R. L. § 2230. See local statutes for any particular state.

<sup>149</sup> Brightly, Purd. Dig. "Intestates," §§ 25, 26, 33.

that state the right of representation is extended to descendants of grandparents, who, if all in the same degree, take equal shares; if in unequal degree, take by right of representation.<sup>150</sup> In Virginia it seems that the statute allows representation among any descendants of any class entitled to share.<sup>151</sup> The effect of the presence or absence of this right is as follows: In cases where it does not exist, all living members of the class entitled to take take equal shares, excluding the issue of all deceased members of the class;<sup>152</sup> in cases where the right exists, if all the kindred who are alive at the death of the intestate are of the same degree, no matter what the degree of the class may be, the case is one of equal kinship, and all the members of the class take equal shares, and the right of representation does not apply;<sup>153</sup> but, if the kindred are in unequal degrees of nearness to the intestate, the issue of deceased members of the class nearest in kin to the intestate take their ancestor's share per stirpes.<sup>154</sup> For instance, if there are first, second, and third cousins, the issue of different brothers and sisters of the deceased, the first cousins take per capita equal shares, and the second and third are excluded from any share, as the right of representation does not extend so far.<sup>155</sup> It should be noticed that the use of the phrase "according to the statute of distribution" in wills gives rise to some uncertainty. Thus, when a will provides that the property shall go to those entitled to it by the statute of distribution, it goes by right of representation when that right exists; but, if the will directs that the property shall go in equal shares to those entitled to it by the statute of distribution, those who would take by representation take an equal share with the others.<sup>156</sup> In cases of unequal kinship among kindred, if they are of a class that has the right of representation,—for example, if the nearest living relative of the deceased is a child of a brother or

<sup>150</sup> Acts 1887, No. 145.

<sup>151</sup> Code, § 2548.

<sup>152</sup> Conant v. Kent, 130 Mass. 179; Bigelow v. Morong, 103 Mass. 287; Davis v. Vanderveer's Adm'r, 23 N. J. Eq. 580.

<sup>153</sup> Snow v. Snow, 111 Mass. 389; Knapp v. Windsor, 6 Cush. (Mass.) 156, 162.

<sup>154</sup> Davis v. Vanderveer's Adm'r, 23 N. J. Eq. 580; Wagner v. Sharp, 33 N. J. Eq. 520.

<sup>155</sup> Davis v. Vanderveer's Adm'r, 23 N. J. Eq. 580.

<sup>156</sup> Welsh v. Crater, 32 N. J. Eq. 180; Scudder's Ex'rs v. Vanarsdale, 13 N. J. Eq. 110, 112.

sister, and there are also grandchildren of deceased brothers or sisters,—all the issue of deceased brothers and sisters take, by right of representation, the shares of their parents; but, if the nearest living relatives of the deceased are beyond the limit of the right of representation,—for example, a grandchild of deceased brothers or sisters, in New Jersey,—those who are next of kin in equal degree share equally, excluding those who are more remote.<sup>157</sup> If the next of kin are all children of deceased brothers and sisters, they all take equally, and not by the shares of the deceased brothers and sisters.<sup>158</sup> The best way of finding whether the right of representation exists in any case is to consider to what class of relatives as distributees the estate descends; for example, brothers and sisters, or nephews and nieces, or cousins, and so forth. The class being determined, the question whether any one not in that class has a right to any share in the estate may be determined by consulting the statute of the state in regard to the right of representation. For instance, if the nearest relatives are first cousins, they constitute the class; and if there are second cousins, their right to a share as children of deceased first cousins depends on whether they are, by the statutes of the state, entitled to represent their parent. In New Jersey the statute limits representation to the children of deceased brothers and sisters, and therefore in that state the second cousins cannot share in the estate.<sup>159</sup> To sum up, it may be said, in all cases where all the next of kin are of equal degree, they take per capita; if they are of unequal degree, and the right of representation applies, they take per stirpes; if the right of representation does not apply, the nearest of kin take per capita, entirely excluding the more remote.<sup>160</sup>

<sup>157</sup> *Wagner v. Sharp*, 33 N. J. Eq. 520; *Davis v. Vanderveer's Adm'r*, 23 N. J. Eq. 580; *Krout's Appeal*, 60 Pa. St. 382.

<sup>158</sup> *Wagner v. Sharp*, 33 N. J. Eq. 520; *Miller's Appeal*, 40 Pa. St. 387; *Stent v. McLeod*, 2 McCord, Eq. (S. C.) 354; *Snow v. Snow*, 111 Mass. 389.

<sup>159</sup> *Davis v. Vanderveer's Adm'r*, 23 N. J. Eq. 580.

<sup>160</sup> *Wagner v. Sharp*, 33 N. J. Eq. 520; *Davis v. Vanderveer's Adm'r*, 23 N. J. Eq. 580; *Miller's Appeal*, 40 Pa. St. 387; *Krout's Appeal*, 60 Pa. St. 382.

## TIME OF DISTRIBUTION.

170. The executor is allowed a certain time in which to collect the estate and pay the debts, before he can be compelled to pay legacies. In the same way, an administrator is allowed a definite time before he is obliged to make distribution of the estate. In absence of contrary statutory provision, no distribution need be made till after one year from the intestate's death; and in most states this time is fixed by statute.

For the statutory limit in each state the local statutes should be consulted.

The payment in distribution is dependent largely on the condition of the estate as shown in the administrator's accounts; for in some states statutes provide that if his accounts show that all the debts are paid, and nothing remains to be done but to distribute, the court may order him to distribute, either wholly or partially, and will not allow him to retain the estate in his hands.<sup>161</sup> The decree of distribution, when it is made by the court, settles the duty of the administrator to pay over the estate forthwith, if so ordered, and also protects him in making such a payment.<sup>162</sup> In some states the administrator may, before paying a distributive share, require a refunding bond to secure him against unknown debts;<sup>163</sup> and it is provided by statute in Massachusetts that if an administrator, within two years after having given bond for the discharge of his trust, is required by any of the next of kin to make payment in whole or in part of a distributive share, the probate court will require the person who demands such payment to give bond to the executor or administrator to refund the amount

<sup>161</sup> Me. Rev. St. c. 65, § 27; Md. Rev. Code, art. 50, § 220.

<sup>162</sup> Sayre v. Sayre, 16 N. J. Eq. 506; Pierce v. Prescott, 128 Mass. 140; White v. Weatherbee, 126 Mass. 450; Shriver v. State, 4 Atl. 679, 65 Md. 282.

<sup>163</sup> Me. Rev. St. c. 65, § 30; N. J. Revision, "Orphans' Courts," § 150; Brightly, Purd. Pa. Dig. "Decedents' Estates," § 222; R. I. Pub. St. c. 187, § 10; Vt. R. L. § 2240. Cf. ante, p. 358, c. 18.

so to be paid, or so much thereof as may be necessary to satisfy any demands that may be afterwards recovered against the estate of the deceased, and to indemnify the executor or administrator against all loss or damage on account of such payment.<sup>164</sup> By another statute of the same state partial distribution may be made at any time by order of the court, after such notice as it sees fit.<sup>165</sup> This power of ordering partial distribution is in many states affirmed and settled by statute.<sup>166</sup>

The executor or administrator who has been appointed upon the estate of a person who has been absent and unheard of for 25 years cannot be compelled to pay over the estate to the heirs without positive proof of the death of the absent person.<sup>167</sup>

### MODE OF DISTRIBUTION.

**171.** The right to a distributive share is a vested interest, vesting in those entitled immediately on the death of the intestate; and, although a settlement of the estate is delayed, and a decree of distribution postponed, yet the decree of distribution, when made, relates back to the time of the decease of the intestate, and apportions the estate to the persons then entitled, or their representatives.

The decree does not create the right, which is determined by the state of things at the intestate's death, but judicially ascertains the distributees, the whole amount to be distributed, and the amount of the distributive share of each.<sup>168</sup> The administrator may, however, make a payment of a distributive share without the decree of the probate court, but he does so at his peril. If he pays the right amount to the right person, he will be credited with it in his accounts.<sup>169</sup> If money has been advanced by the administra-

<sup>164</sup> Pub. St. c. 136, § 20.

<sup>165</sup> Pub. St. c. 136, § 21.

<sup>166</sup> Brightly, *Purd. Pa. Dig. "Decedents' Estates,"* §§ 220, 221.

<sup>167</sup> *Beck's Estate*, 15 Pa. Co. Ct. R. 564.

<sup>168</sup> *Per Shaw, C. J., in Davis v. Newton*, 6 Metc. (Mass.) 537; *Nickerson v. Bowly*, 8 Metc. (Mass.) 430; *Skellenger's Ex'r's v. Skellenger's Ex'r*, 32 N. J. Eq. 662; *Welsh v. Crater, Id.*, 180.

<sup>169</sup> *Young v. Thrasher*, 48 Mo. App. 327.



tor on account of the distributive shares, and he is compelled to pay interest on funds in his hands up to the time of accounting, he should charge interest on the advances made to the distributees.<sup>170</sup>

In the payment of distributive shares any debt due to the estate from the distributee should be deducted from his share, and the probate court may determine the amount and validity of the debt, and make proper orders to give effect to the set-off and deduction. But this deduction, until it is actually made, does not hinder the recovery of the debt by any remedy the administrator may have, nor affect the liability of the distributee for the excess of his debt over the amount of his share.<sup>171</sup>

Advancements made to children by the parents in their lifetime are generally considered as being part of the distributive share of the children in the intestate's estate, and are to be reckoned as such in computing the proper distribution of the estate.<sup>172</sup>

This right to distribution arises in cases of partial as well as total intestacy. For example, if there is a will, but also estate not covered by the will, or if the will fails as to some portion of the estate which is not covered by any residuary clause, the intestate estate is distributed under the statute of distributions, as if there had been no will. Thus, if the deceased was a married man, and there is partial intestacy, his widow gets her distributive share, and, although she may die before distribution, yet her representative is entitled to her share.<sup>173</sup>

<sup>170</sup> *Cunningham v. Cauthen*, 21 S. E. 800, 44 S. C. 95.

<sup>171</sup> *Webb v. Fuller*, 27 Atl. 346, 85 Me. 443; *Donaldson's Estate*, 27 Atl. 959, 158 Pa. St. 292; *Rudolph v. Underwood*, 16 S. E. 55, 88 Ga. 664; *Moore's Estate*, 31 Pac. 584, 96 Cal. 522. Cf., also, as to legacies, ante, p. 354.

<sup>172</sup> Cal. Civ. Code (Deering) § 1395 et seq.; Conn. Gen. St. § 630; Ill. Ann. St. (Starr & C.) c. 39, par. 5; Ind. Rev. St. § 2479; Iowa Rev. Code, § 2459; Kan. Comp. Laws, §§ 2264, 2265; Me. Rev. St. c. 75, §§ 5-7; Md. Rev. Code, art. 48, § 7; Mass. Pub. St. c. 128; Mich. Ann. St. § 5777a et seq.; N. H. Gen. Laws, c. 203, §§ 9-12; N. J. Revision, "Orphans' Courts," § 147; N. Y. 3 Rev. St. (7th Ed.) p. 2305, §§ 76-78; Ohio, Rev. St. § 4169 et seq.; Brightly, *Purd. Pa. Dig. "Intestates,"* § 35; R. I. Pub. St. c. 187, § 18; S. C. Gen. St. § 1849; Vt. R. L. §§ 2246-2251; Va. Code, § 2561. See *Abb. Desc. Wills & Adm.* § 10. Mass. Pub. St. c. 128, §§ 1-7.

<sup>173</sup> *Skellenger's Ex'rs v. Skellenger's Ex'r*, 32 N. J. Eq. 662; *Nickerson v. Bowly*, 8 Metc. (Mass.) 430.

The distribution of the estate among the various next of kin is governed by the law of the state where the deceased last dwelt, although it is different from that of the state where the goods are situated; and the rights of next of kin depend upon the laws of the state of domicile,<sup>174</sup> and the domicile of a married woman is that of her husband.<sup>175</sup> The rights of a widow to her distributive share are governed by the laws of her husband's domicile.<sup>176</sup>

### PAYMENT OF DISTRIBUTIVE SHARE.

**172. Payments by an executor or administrator of the distributive shares in the estate are subject to the following rules, inter alia:**

- (a) Payment is to be made to the person entitled to the share at the time of payment.
- (b) Payment is to be made only to persons competent to receive it.
- (c) Payment is to be compelled by obtaining a decree for distribution, and suing the administrator personally or on his bond.
- (d) An administrator is not liable for overpayments made by order of the probate court, or where he has taken a refunding bond.

Thus a voluntary conveyance of the right may be made by the distributee, and in such a case the share, when it is payable, should be paid to the one to whom it has been conveyed.<sup>177</sup> Again, the distributee may have gone into bankruptcy or insolvency, and in such a case his right to his distributive share passes to the assignee in bankruptcy or insolvency with the rest of the bankrupt's property,

<sup>174</sup> *Dawes v. Boylston*, 9 Mass. 355. See ante, p. 167, c. 10; and Abb. Desc. Wills & Adm. § 100.

<sup>175</sup> *Harrall v. Wallis*, 37 N. J. Eq. 458.

<sup>176</sup> *Harrall v. Wallis*, 37 N. J. Eq. 458. Cf. ante, p. 23, c. 2.

<sup>177</sup> *Stevens v. Palmer*, 15 Gray (Mass.) 505; *Knowlton v. Johnson*, 46 Me. 489. But cf., as to legacies, ante, p. 369, c. 18. And such payment will be made only on the consent of the assignee.

and should be paid to him.<sup>178</sup> When, in such case, all the property of the insolvent which he had at the time of the first publication of the notice of insolvency vests in the assignee, a distributive share vests in the assignee if the intestate died before that publication, but not if he died after that date.<sup>179</sup> Again, the distributive share may be attached or trustee in the hands of the administrator, who, in such case, must retain the fund until the termination of the suit in which the attachment was made decides to whom the fund is payable. Such attachment by trustee process may be made at any time after the administrator has qualified,<sup>180</sup> and before the actual payment. It is not necessary to wait until a decree of distribution is made;<sup>181</sup> but the attachment covers all that the distributee will eventually be entitled to receive.<sup>182</sup> Such attachment does not bind an administrator when the debtor owes the administrator more than the amount of his distributive share.<sup>183</sup> In the absence of any assignment, the probate court will not recognize the claim of any creditor of the distributee, but will order the share to be paid to the distributee.<sup>184</sup> Besides these conveyances, voluntary or involuntary, the right to the distributive share passes, at the death of the distributee, to his personal representatives, or to a legatee if he has bequeathed it, and should be so paid.<sup>185</sup> Thus, if one die, and there is a partial intestacy as to his estate, as well as when there is complete intestacy, his widow has a right to a distributive share; and, if she dies before distribution is actually made, her personal representatives—that is, her executor, if she left a will, otherwise her administrator—are entitled to the payment of the share to them.<sup>186</sup> If there is no representative of the estate of the deceased

<sup>178</sup> *Hay v. Green*, 12 Cush. (Mass.) 282.

<sup>179</sup> *Davis v. Newton*, 6 Metc. (Mass.) 537, 540.

<sup>180</sup> *Davis v. Davis*, 2 Cush. (Mass.) 111. See post, p. 493, c. 23.

<sup>181</sup> *Holbrook v. Waters*, 19 Pick. (Mass.) 354; *Wheeler v. Bowen*, 20 Pick. (Mass.) 563.

<sup>182</sup> *President, etc., of Boston Bank v. Minot*, 3 Metc. (Mass.) 507.

<sup>183</sup> *Henshaw v. Whitney*, 11 Gray (Mass.) 223.

<sup>184</sup> *In re Redfield*, 25 N. Y. Supp. 3, 71 Hun, 344.

<sup>185</sup> *Hooper v. Hooper*, 9 Cush. (Mass.) 122.

<sup>186</sup> *Nickerson v. Bowly*, 8 Metc. (Mass.) 430; *Skellenger's Ex'rs v. Skellenger's Ex'r*, 32 N. J. Eq. 662; *Gill v. Roberts*, 33 N. J. Eq. 476.

distributee, there should be some one appointed for that purpose, or the payment cannot be made.<sup>187</sup>

### *Competent Persons.*

The right of the wife at common law to any distributive share in any estate belonged to her husband, and, if he reduced this right to possession, she lost all claim on it; but, if he died before reducing it to possession, her right revived.<sup>188</sup> By statute, now, in most states, the wife's right to such a share is free from the husband's control. As to the question of the rights of his creditors in such an interest in a distributive share before the statute in regard to married women's property was enacted, it will be of assistance to compare what was said on this subject in regard to legacies to the wife;<sup>189</sup> to which it may be added that the equitable right of the wife to claim provision out of a distributive share as against her husband's creditors was lost by payment of the share to her, for it then became her husband's wholly.<sup>190</sup> The distributive share of an infant should not be paid to the mother merely as natural guardian, and, if it is, the mother's receipt, and the approval of the account of the administrator by the court, will not prevent the administrator from being obliged to pay over the amount again to the infant.<sup>191</sup> Generally, the infant's share should be paid to a guardian of his property.<sup>192</sup>

### *Actions for Distributive Shares.*

The right of those entitled to the estate to bring actions for their distributive shares depends somewhat upon the statute of the state. At common law no such right existed, even though the administrator had expressly promised to pay the share.<sup>193</sup> Generally such a right is not given until a decree of distribution has been ordered by the court, after which, the amount which each distributee is to take being ascertained, he may generally bring suit at law to recover that

<sup>187</sup> *In re Lane's Estate* (Surr.) 20 N. Y. Supp. 78.

<sup>188</sup> *Hayward v. Hayward*, 20 Pick. (Mass.) 517; *Gill v. Roberts*, 33 N. J. Eq. 476. Cf. ante, p. 366, c. 18.

<sup>189</sup> Ante, p. 367.

<sup>190</sup> *Chase v. Palmer*, 25 Me. 341.

<sup>191</sup> *Williams v. Adams*, 21 S. E. 526, 94 Ga. 270.

<sup>192</sup> *Lowman v. Railroad Co.*, 32 N. Y. Supp. 579, 85 Hun, 188. Cf. ante, p. 365, c. 18.

<sup>193</sup> *Jones v. Tanner*, 7 Barn. & C. 542.

amount.<sup>194</sup> If no such decree has been rendered, he should apply to the probate court to compel the administrator to account, and then for a decree of distribution.<sup>195</sup> If, in such a suit, the plaintiff undertakes to claim any specific share of the estate, he must show facts which entitle him to claim that share. For instance, if the deceased had four sisters and two brothers, and the plaintiff is the only son of one of these two brothers, who died before the deceased, and it appear that two of the sisters died also before the deceased, leaving no issue, and the plaintiff claims one-third, the burden is upon him to show that the other brother died leaving no issue, and not upon the administrator to show that the other brother or his issue is still alive.<sup>196</sup>

Another form of action against an administrator by those entitled to distribution of the estate is a suit upon the probate bond. There can be no direct suit by them for their distributive shares until after a decree of distribution has been passed, and the probate accounts settled, for, until then, it must be uncertain whether there will be any remainder to distribute. To ascertain whether there is such remainder, the proper remedy of an heir claiming a distributive share is to cite the administrator to settle his account, and, if there be a surplus appearing on such account, to apply to the probate court to make a decree of distribution according to law. After such a decree is made, it becomes a part of the duty of the administrator to distribute the estate according to the provisions of the decree; and, if he refuses to pay a distributive share on demand, this refusal is ipso facto a breach of the bond, and the distributee may, after demand of payment and refusal, forthwith bring an action on the probate bond for his own benefit, without any permission or authority of the judge of probate. In such action on the bond the decree of

<sup>194</sup> *Schmidt v. Stark*, 63 N. W. 255, 61 Minn. 91. See *Mathis v. Weaver*, 20 S. E. 113, 94 Ga. 581; *Stewart v. Morrison*, 17 S. W. 15, 81 Tex. 396. *Cathaway v. Bowles*, 136 Mass. 54; *Shriver v. State*, 4 Atl. 679, 65 Md. 285; *Commonwealth v. Hammond*, 10 B. Mon. (Ky.) 62; *Negley v. Gard*, 20 Ohio, 310; *Gould v. Hayes*, 19 Ala. 438; *Waldsmith's Heirs v. Waldsmith's Adm'rs*, 2 Ohio, 156; *App v. Dreisbach*, 2 Rawle (Pa.) 287; *Solliday v. Bissey*, 12 Pa. St. 347; *Henry's Ex'r v. Dilley*, 25 N. J. Law, 302.

<sup>195</sup> *Cathaway v. Bowles*, 136 Mass. 54.

<sup>196</sup> *Shriver v. State*, 4 Atl. 679, 65 Md. 285.

distribution not appealed from is conclusive of the right of the distributee, and its validity cannot be drawn in question by any pleading or proof;<sup>197</sup> and, if a payment is made by the administrator in accordance with this decree, he is protected by the decree, and the validity of the payment cannot be questioned.<sup>198</sup> After a decree of distribution has been made, and nothing remains but to pay money over to the distributee, it seems that a direct action upon the decree would lie against the administrator, as well as an action on the probate bond.<sup>199</sup>

*Overpayments.*

The administrator has in many states statutory authority to require a refunding bond from the persons to whom he pays over portions of the estate in distribution, and this bond will protect him in case debts should afterwards appear which must be paid; but the fact that he does not require the refunding bond does not invalidate the title of the distributee, nor allow a creditor to recover the property thus distributed.<sup>200</sup> If the administrator attempts to pay a distributive share by a draft on a bank, and the bank breaks before the draft is paid, the administrator is liable to the distributee for the amount.<sup>201</sup> If the administrator makes an overpayment by order of the probate court, he is not personally liable.<sup>202</sup> If he makes a payment to one who is not entitled upon his promise to refund if necessary, the administrator to whom the promise is made can recover the amount.<sup>203</sup>

<sup>197</sup> *Loring v. Steineman*, 1 Metc. (Mass.) 208; *Cathaway v. Bowles*, 136 Mass. 54. Cf. post, p. 518, c. 23.

<sup>198</sup> *Pierce v. Prescott*, 128 Mass. 140; *Cathaway v. Bowles*, 136 Mass. 54; *Loring v. Steineman*, 1 Metc. (Mass.) 208; *White v. Weatherbee*, 126 Mass. 450.

<sup>199</sup> *Cathaway v. Bowles*, supra.

<sup>200</sup> *Ferguson v. Yard*, 30 Atl. 517, 164 Pa. St. 586. Cf. ante, 358, c. 18.

<sup>201</sup> *State v. Wagers*, 47 Mo. App. 431.

<sup>202</sup> *Young v. Thrasher*, 48 Mo. App. 327.

<sup>203</sup> *Norwood v. O'Neal*, 16 S. E. 759, 112 N. C. 127.

## CHAPTER XX.

### ADMINISTRATION ACCOUNTS.

- 173. Contents of Accounts.
- 174. Time and Manner of Accounting.
- 175. Charges in Account.
- 176. Allowances in Account.
- 177. Commissions and Compensation.
- 178. Hearing an Account.
- 179. Failure to Account.
- 180. Accounting between Successive Administrators.

### CONTENTS OF ACCOUNTS.

173. An accounting is a brief financial statement of the manner in which the executor or administrator has performed the duties of his office in collecting the assets and making payments to those who are entitled. The basis of the accounting is that he charges himself with the corpus of the estate, as shown by the inventory, and any increase thereon, and is allowed all his proper and legal payments.

The charging part of an account has been considered in considering what are assets of the estate; and the allowances, in considering the payments of debts, legacies, and distributive shares. There remain, however, the form and time of accounting to consider.

### TIME AND MANNER OF ACCOUNTING.

174. The executor or administrator is generally required by statute law to render an account at stated intervals, which are ordinarily once within the first year of his office, and afterwards at such times as he shall be ordered by the court, or at regular intervals. This account is generally required to be

verified by the oath of the accountant, and he is also generally liable to be examined under oath as to the items in the account rendered by him.

Neither the executor nor administrator can in any way bar the right of those interested in the estate to require an account. For instance, although the administrator may, when he is cited to account, produce receipts from all those entitled to distribution of the estate, acknowledging receipt of their distributive shares in full, he is still liable to account, in order that the distributees may have an opportunity to show whether or not the receipts were properly obtained, and ought to bar them.<sup>1</sup> But, if the person who cites the executor or administrator to account has given a release of all his interest in the estate, he cannot compel an account, for he is no longer a party interested in the estate.<sup>2</sup> If he asserts that his release is void, or procured by fraud, he is not entitled to compel the executor or administrator to account, for a probate court will not try the question of fraud in such a manner, but will accept the *prima facie* rights of the parties.<sup>3</sup> But an executor or administrator who has given a statutory bond to pay debts and legacies, as has before been seen, is not obliged to account.<sup>4</sup> If there is administration taken out in several states, the accounts of the various administrations may and must be settled in the states to which they belong.<sup>5</sup> An administrator who is deposed from his office by the finding of a will must account for his administration, even though he is the executor of the will.<sup>6</sup>

No lapse of time will bar the right of those interested in the estate as distributees or legatees to call for an accounting, unless the fiduciary relation between them and the executor or administrator has been terminated or repudiated; and the concealing of assets by the executor on final accounting is not a repudiation of

<sup>1</sup> *Bard v. Wood*, 3 Metc. (Mass.) 74. See Abb. Desc. Wills & Adm. § 167.

<sup>2</sup> *In re Pruyn*, 36 N. E. 595, 141 N. Y. 544.

<sup>3</sup> *In re Wagners' Estate*, 23 N. E. 200, 119 N. Y. 28. See *Reilley v. Duffy*, 4 Dem. Sur. 366.

<sup>4</sup> *Ante*, p. 185, c. 12.

<sup>5</sup> *Jennison v. Hapgood*, 10 Pick. 77.

<sup>6</sup> *Bennett v. Woodman*, 116 Mass. 518.



the trust.<sup>7</sup> But if the lapse of time is great, and parties and witnesses are dead, and evidence has been lost, the court will greatly relax the strictness of the account.<sup>8</sup> And the accounting should always be in the court which granted the appointment.<sup>9</sup> Ordinarily, an executor or administrator should account once a year; and, if he does not, his account will be stated with annual rests when it is made.<sup>10</sup>

#### CHARGES IN ACCOUNT.

**175.** The value of the assets at the death of the deceased is charged against the executor or administrator in his account; and, if they have increased in value since then, the gain is also charged against him, together with any additional assets that may have come into his possession since the inventory was made.

The liability of the administrator to be charged with property of the deceased<sup>11</sup> may be varied by the acts of those entitled to distribution of the estate. Thus, if all persons interested in the estate request the administrator or executor to continue the business of the deceased, and he does so in good faith, and loses money in it belonging to the estate, he will be allowed for such loss in his accounts.<sup>12</sup>

In many states the value of the personal property as it is stated in the inventory and appraisal filed by the executor or administrator at the beginning of his office is made the basis of his accounting, and he is charged with that value, allowing him for any decrease which does not arise from his fault, and charging him with any increase in the value of the estate over that appraisal

<sup>7</sup> *Davis v. Eastman*, 30 Atl. 1, 66 Vt. 651; *In re Beyea's Estate* (Surr.) 31 N. Y. Supp. 200.

<sup>8</sup> *Anderson v. Northrop*, 12 South. 318, 30 Fla. 612.

<sup>9</sup> *In re Higgins' Estate*, 39 Pac. 506, 15 Mont. 474.

<sup>10</sup> *McNulty v. De Saussure* (S. C.) 19 S. E. 926. Cf. ante, p. 269, c. 15.

<sup>11</sup> N. Y. 3 Rev. St. p. 2303, § 57; Ohio Rev. St. §§ 6179, 6180; Ind. Rev. St. 1881, § 2389; Mich. Ann. St. § 5949; Kan. Comp. Laws, c. 37, §§ 152, 153; *Rolfe v. Van Sickles' Ex'rs*, 40 N. J. Eq. 158.

<sup>12</sup> *Poole v. Munday*, 103 Mass. 174. Cf. post, p. 479, c. 23.

value.<sup>13</sup> An administrator *de bonis non* is not chargeable with all the estate as shown in original inventory, but only what comes into his hands and possession.<sup>14</sup> An executor or administrator is chargeable with money paid him in other states by debtors of the estate, in payment of their debts.<sup>15</sup> An executor or administrator is never charged with the loss of uncollectible debts; and, although a debt may be inventoried at its face value, yet, if it remains uncollected without any fault of the executor or administrator, he is allowed the amount in his accounts.<sup>16</sup> In many states, by statute, debts which are considered bad by the appraisers of the estate are inventoried as desperate, in which case the presumption in accounting is that they are uncollectible; and any one who wishes the executor or administrator to be charged with the amount must show that the debts might have been collected.<sup>17</sup>

It has already been seen that the rule of the common law by which the debt of an executor or administrator was considered extinguished by his appointment has been generally modified in the United States so far as to adopt the view which has always been taken by courts of equity; that is, that although the remedy for the debt is gone, because an executor cannot, in his official capacity, sue himself in his private capacity, yet the debt still remains, and, in order to give the benefit of this amount to those to whom the estate is to be distributed, the executor is considered to have paid the money into the estate, and is to be charged with the amount of his debt in his accounts. The same rule is applied to the case of an administrator who is also debtor to the estate. He is charged with the amount of his debt in his accounts.<sup>18</sup> In many states a second inventory may be filed, if property is afterwards

<sup>13</sup> Mass. Pub. St. c. 144, § 3; Vt. Rev. Laws, §§ 2096, 2097; Mich. 2 Ann. St. §§ 5950, 5951; Iowa Rev. Code (Miller) §§ 2471-2473; Md. Rev. Code, art. 50, §§ 213, 219; Cal. Code Civ. Proc. §§ 1613, 1614.

<sup>14</sup> *Higgs v. Garrison* (Tex. Civ. App.) 27 S. W. 34.

<sup>15</sup> *McPike v. McPike*, 20 S. W. 12, 111 Mo. 216. Cf. ante, p. 159, c. 10.

<sup>16</sup> Cal. Code Civ. Proc. § 1615; Ind. Rev. St. 1881, § 2389; Kan. Comp. Laws, c. 37, § 154; Me. Rev. St. c. 64, § 51; Mass. Pub. St. c. 144, § 3; Mich. 2 Ann. St. § 5954; N. H. Gen. Laws, c. 196, § 8; Ohio Rev. St. § 6181; Vt. Rev. Laws, § 2100.

<sup>17</sup> Ante, p. 202, c. 13.

<sup>18</sup> *Stevens v. Gaylord*, 11 Mass. 269; *Bull's Appeal*, 24 Pa. St. 286; *Kingan's*

found belonging to the estate, not included in the first inventory. In other states such property is included in the accounts only.<sup>19</sup> In either case the executor or administrator is chargeable with the whole personal estate, whether included in the inventories or not.<sup>20</sup>

The real estate of the deceased does not in most states enter into the accounts of an administrator; but, if either he or an executor has sold or mortgaged the real estate in the course of administration to pay debts, he must account for the proceeds.<sup>21</sup> He may reimburse himself out of such proceeds for any debts of the deceased which he may have lawfully paid from his own funds.<sup>22</sup> If he is directed by the will to sell and convey away the testator's land, he will be allowed for taxes paid to facilitate the sale, though assessed after the testator's death.<sup>23</sup> The income or rents of real estate do not generally form a part of an administrator's accounts.<sup>24</sup> So, where a widow has collected rents and leased properties of her husband's estate, she cannot be required to account for them as executrix.<sup>25</sup> But there are sometimes cases where he is, by statute, allowed to occupy the real estate or receive the profits of it by consent of the heirs, for the benefit of the estate, or by reason of some interest under a will, and he then accounts for such income as part of his administration account.<sup>26</sup>

Interest is not charged as a matter of course on all sums in the hands of the executor or administrator, but only when the circum-

Appeal, 24 Pittsb. Leg. J. 41; *Baucus v. Stöver*, 89 N. Y. 1; *Condit v. Winslow*, 5 N. E. 751, 106 Ind. 142; ante, p. 242, c. 14.

<sup>19</sup> Ante, p. 200, c. 13.

<sup>20</sup> Ind. Rev. St. 1881, § 2389; Kan. Comp. Laws, c. 37, § 152; Me. Rev. St. c. 64, § 56; Mass. Pub. St. c. 144, § 4; N. H. Gen. Laws, c. 196, § 4; R. I. Pub. St. c. 190, § 4; *Selectmen of Boston v. Boylston*, 4 Mass. 318.

<sup>21</sup> Ind. Rev. St. 1881, § 2389, Kan. Comp. Laws, c. 37, § 152; Me. Rev. St. c. 64, § 56; Mass. Pub. St. c. 144, § 4; Mich. Ann. St. § 5949; Vt. Rev. Laws, §§ 2096, 2099. Cf. ante, p. 207, c. 14; Id. p. 280, c. 16.

<sup>22</sup> *Bolton v. Myers*, 40 N. E. 737, 146 N. Y. 257.

<sup>23</sup> *In re Perry's Estate*, 25 N. Y. Supp. 716, 5 Misc. Rep. 149.

<sup>24</sup> *Brooks v. Jackson*, 125 Mass. 309; *McPike v. McPike*, 20 S. W. 12, 111 Mo. 216.

<sup>25</sup> *Miller's Estate*, 4 Pa. Dist. R. 408.

<sup>26</sup> *Shuffler v. Turner*, 16 S. E. 417, 111 N. C. 297; *State v. Barrett*, 22 N. E. 969, 121 Ind. 92; Me. Rev. St. c. 64, § 57; Mass. Pub. St. c. 144, § 5; Mich. Ann. St. § 5955; N. H. Gen. Laws, c. 196, § 11; Vt. Rev. Laws, § 2101.

stances of the case are such as to show that he ought to have invested them; for example, when he has large sums in his hands, which he will not be obliged to pay out for a considerable time, or, generally speaking, when the case shows that he was negligent in not investing the money. If such is the case, interest will be charged against him.<sup>27</sup> But the executor may have a balance in his hands for a long time, yet not be liable to be charged with interest on it. Thus, where the settlement of an estate was considerably delayed by a lawsuit, it was held that the executor was not chargeable with interest in the meantime.<sup>28</sup> This subject is more fully discussed in considering the management of the estate.<sup>29</sup>

### ALLOWANCES IN ACCOUNT.

**176. An executor or administrator is allowed in his account his expenses and costs, his duly-authorized disbursements and payments of debts, legacies, and distributive shares, and his commissions or remuneration.**

#### *Funeral Expenses.*

These expenses have already been considered at some length,<sup>30</sup> and it will be necessary here only to state that whatever expenses are proper, considering the state and condition of the deceased, will be allowed to the executor or administrator in his accounts.<sup>31</sup> He should have receipts or other proper evidence to support his items of allowance.<sup>32</sup>

#### *Costs of Administration.*

These items of expenditure have already been discussed, and it is sufficient here to say that whatever is a proper cost of the administration will be allowed the executor or administrator in his accounts.<sup>33</sup>

<sup>27</sup> Ante, p. 269, c. 15.

<sup>29</sup> See ante, p. 269, c. 15.

<sup>28</sup> Lamb v. Lamb, 11 Pick. (Mass.) 371.

<sup>30</sup> Ante, p. 313, c. 17.

<sup>31</sup> M'Glinsey's Appeal, 14 Serg. & R. (Pa.) 64; Bradley's Estate, 32 Leg. Int. (Pa.) 257; Bell v. Briggs, 4 Atl. 702, 63 N. H. 592.

<sup>32</sup> Buerhaus v. De Saussure, 19 S. E. 926, 41 S. C. 457.

<sup>33</sup> Ante, p. 318, c. 17.

*Payment of Debts.*

The general rules to guide the executor or administrator in the payment of debts have been already discussed, and it is not necessary to recapitulate them in this place. It is enough to say, in general, that, if the payment of the debt was proper, the sum paid is to be allowed to the administrator or executor in his account.<sup>34</sup>

The executor or administrator is, of course, bound to show by his accounts what has become of all the assets of the estate which came into his possession; but if he is residuary legatee, and has paid all debts and charges against the estate, of which he knows, and which are presented in due course, he may treat the assets as his own; and, if another creditor later demands payment of his claim, he can only require the executor to account for the true value of the assets, as of the time of such application, of which value the inventory appraisal is *prima facie*, but not conclusive, evidence.<sup>35</sup> Generally, when an executor or administrator is charged with wrongful dealing with assets, the appraisal value is *prima facie* evidence of the real value.<sup>36</sup>

Money advanced by an accountant to the estate for the objects of administration, on account of lack of funds belonging to the estate, will be allowed him in his accounts.<sup>37</sup> The court of probate will investigate the circumstances of the loan, so as to satisfy itself that there was no improper motive or unfair advantage taken in making the advance, and, if there was none, may allow the sums so advanced, and also interest from the time when the loan was made until the time when the executor or administrator repaid himself from the funds of the estate, or might and ought to have done so.<sup>38</sup> The money may be advanced for the ordinary purposes of administration, such as paying debts, etc., or it may be

<sup>34</sup> Sterrett's Appeal, 2 Pen. & W. 419. Cf. ante, p. 322, c. 13.

<sup>35</sup> In re Mullan's Estate, 39 N. E. 821, 145 N. Y. 98.

<sup>36</sup> Id.; In re Shipman, 31 N. Y. Supp. 571, 82 Hun, 108; Spruance v. Darlington (Del. Ch.) 30 Atl. 663.

<sup>37</sup> Munroe v. Holmes, 13 Allen (Mass.) 109; Ames v. Jackson, 115 Mass. 510; Liddel v. McVickar, 11 N. J. Law, 48.

<sup>38</sup> Liddel v. McVickar, 11 N. J. Law, 48; Walker's Estate, 3 Rawle (Pa.) 243; Hobson's Estate, 25 Pittsb. Leg. J. 456; Callaghan v. Hall, 1 Serg. & R. (Pa.) 241; Jennison v. Hapgood, 10 Pick. (Mass.) 78. Contra, Storer v. Storer, 9 Mass. 37.

advanced for purposes which are rendered proper by the provisions of the will. Thus, where the will directs the executor to whom real estate was devised in trust to take down and rebuild any part of the buildings, to erect additional buildings, and to hire money for the purpose of bettering the trust estate, it was held proper for the executor to advance his own money to the estate, and charge it in his administration account.<sup>39</sup>

### COMMISSIONS AND COMPENSATION.

177. The compensation of an executor or administrator is in most states regulated by statute. In England the executors or administrators received no compensation, because they were the parties entitled to the residue of the estate, and therefore amply compensated for the time and labor of administration. In the United States, however, the office of executor or administrator is merely a trust, and the incumbent receives no advantage from it, and he is therefore allowed, by statute, compensation for his time and labor.

In some states the statutes merely provide that he shall have such compensation as the court shall deem reasonable and just.<sup>40</sup>

In Alabama an executor or administrator is allowed a commission on the receipts and disbursements which may seem a fair one to the probate court, and this must not exceed  $2\frac{1}{2}$  per cent. on the receipts, and the same sum on the disbursements; and upon the appraised value of all personal property, and the amount of money and solvent notes distributed by them, they are allowed the same amount as upon disbursements.<sup>41</sup>

In California his commissions are as follows: For the first

<sup>39</sup> *Watts v. Howard*, 7 Metc. (Mass.) 478.

<sup>40</sup> Mass. Pub. St. c. 144, § 7; R. I. Pub. St. c. 190, § 8; *Wendell v. French*, 19 N. H. 205, 210; *Canfield v. Bostwick*, 21 Conn. 555; *Shunk's Appeal*, 2 Pa. St. 307; *Harris v. Martin*, 9 Ala. 899; Ind. Rev. St. 1881, § 2396; Kan. Comp. Laws, c. 37, § 162.

<sup>41</sup> Ala. Code, §§ 2151, 2152.

\$1,000, at the rate of 7 per cent.; for all above that sum, and not exceeding \$10,000, at the rate of 5 per cent.; for all above \$10,000, and not exceeding \$20,000, at the rate of 4 per cent.; for all above \$20,000, and not exceeding \$50,000, at the rate of 3 per cent.; for all above \$50,000, and not exceeding \$100,000, at the rate of 2 per cent.; and for all above \$100,000 at the rate of 1 per cent. The same commission is allowed to administrators. In all cases further allowance for extraordinary services may be done, but not to exceed one-half the ordinary commissions. When the property is distributable in kind, and there is no labor but the custody and distribution, the commissions on the estate above \$20,000 in value are to be computed at half rates. All contracts between an executor or administrator and an heir, legatee, or devisee for a higher compensation than is allowed by statute are void.<sup>42</sup>

In Colorado he is allowed compensation not exceeding 6 per cent. on the whole personal estate, and not exceeding 3 per cent. on all sums arising from the sale and letting of lands.<sup>43</sup>

In Florida he is allowed a fair and just compensation, and also a commission of not more than 6 per cent. on the money arising from the sale of the personal property or lands.<sup>44</sup>

In Georgia he is allowed a commission of  $2\frac{1}{2}$  per cent. on all sums received by him, except moneys loaned by him to the estate, and repaid to him, and a like commission on all sums paid out by him, either on debts, legacies, or to distributees. If he has received interest on money loaned belonging to the estate, and turns in the interest as part of the estate, he receives a commission of 10 per cent. upon it. He receives no commission upon debts, legacies, or distributive shares paid to himself; and, if there are more executors or administrators than one, they share the commissions according to their respective services. No commission is allowed for delivering property in kind; but a compensation may be allowed, in the discretion of the ordinary, for such services, not exceeding 3 per cent. of the appraised value.<sup>45</sup>

In Iowa he is allowed a commission upon the personal estate sold or distributed by him, or on the proceeds of the real estate sold

<sup>42</sup> Cal. Code Civ. Proc. § 1618.

<sup>44</sup> McClel. Dig. c. 2, § 78.

<sup>43</sup> Colo. Gen. St. § 3630.

<sup>45</sup> Ga. Code, §§ 2589-2592.

for the payment of debts. This commission is in full payment for all ordinary expenses, and is 5 per cent. for the first \$1,000; for the surplus, between \$1,000 and \$5,000, at the rate of  $2\frac{1}{2}$  per cent.; for the amount of \$5,000, at the rate of 1 per cent.<sup>46</sup>

In Kentucky he is allowed not more than 5 per cent. of the first \$1,000; 4 per cent. on the second \$1,000; 3 per cent. on the third; and 2 per cent. on the remainder.<sup>47</sup>

In Maine the executor or administrator may have a commission limited by the discretion of the probate judge, up to 5 per cent. of the amount of the personal property.<sup>48</sup>

In Maryland he is allowed commissions at the discretion of the court, not under 2 per cent., nor over 10 per cent., on the first \$20,000 of the estate, and on the balance of the estate not more than 2 per cent.<sup>49</sup>

In Massachusetts it has been in some courts the practice to allow a commission of 5 per cent. on all income collected by the executor or administrator, and also a commission of  $2\frac{1}{2}$  per cent. on all the real or personal property sold by him, and on the appraised value of the rest of the corpus of the estate; but, if the estate exceeds \$1,000,000, only 1 per cent. is allowed on the excess.<sup>50</sup>

In Michigan he is allowed 5 per cent. on the first \$1,000; on the excess above that, up to \$5,000, he is allowed  $2\frac{1}{2}$  per cent.; and on all over \$5,000 he is allowed 1 per cent.<sup>51</sup> And in the same state he is allowed extra compensation if he acts with special skill and diligence.<sup>52</sup>

In Mississippi he is allowed not less than 1 per cent., nor more than 7, on the whole amount administered.<sup>53</sup>

In New Jersey he is to be allowed compensation in proportion to his actual labor and responsibility, rather than to the size of the estate, and the compensation is limited by the following rates: On money coming into his hands not exceeding \$1,000, not more than 7 per cent.; above \$1,000, and not exceeding \$5,000, 4 per cent. on the excess over \$1,000; above \$5,000, and not exceeding \$10,000, 3 per

<sup>46</sup> Iowa, Code, § 2494.

<sup>49</sup> Laws 1884, c. 470.

<sup>47</sup> Ky. Gen. St. c. 39, § 52.

<sup>50</sup> See Mass. Pub. St. 1882, c. 144, § 7.

<sup>48</sup> Me. Rev. St. c. 63, § 32.

<sup>51</sup> Mich. Ann. St. § 5959.

<sup>52</sup> In re Zentner's Estate, 63 N. W. 162, 90 Wis. 236.

<sup>53</sup> Miss. Rev. Code, § 2072.



cent. on the excess over \$5,000; above \$10,000, 2 per cent. on the excess over \$10,000; but, if the receipts exceed \$50,000, the compensation shall not be more than 5 per cent. on the whole receipts, and shall be on the basis of actual services rendered.<sup>54</sup>

In New York he is allowed 5 per cent. on receiving and paying out money not exceeding \$1,000; over that, and not amounting to \$10,000, 2½ per cent.; over that, \$1 per \$100.<sup>55</sup>

In Ohio he is allowed 6 per cent. on the first \$1,000; 4 on the excess up to \$5,000; and, for all above that, 2 per cent., with a provision for extraordinary services.<sup>56</sup>

In some states the courts fix, by percentage or other means, an absolute limit to the amount of the compensation; for example, in Vermont, \$2 for each day's attendance upon the business of their appointment, and extra compensation in cases of unusual difficulty or responsibility, to be settled by the court.<sup>57</sup>

If any provision is made in the will for the compensation of an executor, he must take that provision, since, acting under the will, he must affirm its provisions;<sup>58</sup> but a bequest to the executor does not necessarily mean that the executor shall not also have remuneration for his services, in the absence of express words to that effect.<sup>59</sup> In some states, also, he is given by statute a right to renounce the provision of the will, and take his statutory commissions.<sup>60</sup>

If, by reason of debts owed by the heirs to the estate, the sum paid them is reduced below what it would otherwise be, the administrator is, nevertheless, entitled to commissions upon the whole share undiminished.<sup>61</sup> He is entitled to commission on money coming into his hands, although it afterwards appears that it was a trust fund held by the deceased, and not part of the estate.<sup>62</sup> He is not en-

<sup>54</sup> Revision, "Orphans' Court," § 110.

<sup>55</sup> N. Y. 3 Rev. St. (7th Ed.) p. 2303, § 58.

<sup>56</sup> Rev. St. § 6188.

<sup>57</sup> Vt. Rev. Laws, § 4534.

<sup>58</sup> N. J. Revision, "Orphans' Court," § 111; Vt. Rev. Laws, § 2104; *Manning v. Board*, 8 Metc. (Mass.) 566; *Charlestown College v. Willingham*, 13 Rich. Eq. (S. C.) 195. *Contra*, *Handy v. Collins*, 60 Md. 229.

<sup>59</sup> *In re Mason*, 98 N. Y. 527; *In re Marshall's Estate*, 3 Dem. Sur. (N. Y.) 173.

<sup>60</sup> Vt. Rev. Laws, § 2104.

<sup>61</sup> *Elder v. Whittemore*, 51 Ill. App. 662.

<sup>62</sup> *Bohrer v. Otterback*, 21 D. C. 32.

titled to commissions on uncollectible debts, but may have specific compensation for attempts to collect them.<sup>63</sup> The executor or administrator may forfeit his right to commissions by misconduct in office.<sup>64</sup> Thus, if he neglects to keep accounts, and fails to make investments, as required by the will, and by his negligence involves the estate in litigation, he may forfeit his commissions.<sup>65</sup> But the mere fact that the estate suffers loss by the administration is not enough to deprive the executor or administrator of his commissions, if he has acted in good faith, on a policy recommended by a sound business adviser, and at first approved by creditors.<sup>66</sup> The fact that, in administering part of the estate, the executor or administrator makes mistakes, and is surcharged with large sums, does not deprive him of the commissions, if he acted with great skill and prudence in the rest of his administration.<sup>67</sup> If an executor or administrator claims extra compensation, in addition to the statutory allowance, for extra services, he must show that these services were necessary to the estate, and that the statutory compensation would not be fairly sufficient.<sup>68</sup> Where an executor is also trustee under the will, and the two offices are distinct, he may have commissions on both.<sup>69</sup> If the executor's duties extend over a number of years, and his commissions depend upon amounts received and disbursed, he should be allowed in each year only the assets disbursed in that year.<sup>70</sup> And, if he continues the business of the deceased, he is entitled to commissions on the net profits of the business only.<sup>71</sup> If the one co-executor accepts a certain sum by agreement with the others as his fee as executor, he will not be allowed commissions.<sup>72</sup> The right to commissions is not founded in contract, and the rate may be varied

<sup>63</sup> *Kester v. Lyon*, 20 S. E. 933, 40 W. Va. 161.

<sup>64</sup> *Brooks v. Jackson*, 125 Mass. 311; *Grant v. Reese*, 94 N. C. 720; *Frost v. Denman*, 2 Atl. 926, 41 N. J. Eq. 47; *Eppinger v. Canepa*, 20 Fla. 262.

<sup>65</sup> *Brewster v. Demarest*, 23 Atl. 271, 48 N. J. Eq. 559.

<sup>66</sup> *Sunday's Appeal*, 18 Atl. 931, 131 Pa. St. 584.

<sup>67</sup> *Shinn's Estate*, 30 Atl. 1026, 1030, 166 Pa. St. 121.

<sup>68</sup> *Gloyd's Estate* (Iowa) 61 N. W. 975.

<sup>69</sup> *McCredie's Estate*, 28 N. Y. Supp. 305, 77 Hun, 111.

<sup>70</sup> *Ricker's Estate*, 35 Pac. 960, 14 Mont. 153.

<sup>71</sup> *Beard v. Beard*, 35 N. E. 488, 140 N. Y. 260; *Jones v. Jones*, 17 S. E. 587, 39 S. C. 247.

<sup>72</sup> *Hodgman's Estate*, 35 N. E. 660, 140 N. Y. 421.

from time to time by the legislature, and the new rate will apply to estates in the course of administration at the time the change is made, as well as to those in which the grant of letters is made subsequent to the passage of the act changing the rate; but, if an account has been settled allowing the executor or administrator commissions at a certain rate, this allowance cannot be affected by any change in rate by act of legislature subsequent to the allowance of the commissions.<sup>73</sup> If one ordered by the will to sell real estate makes several bona fide, but unsuccessful, attempts to do so, he may be allowed for his services in the attempts.<sup>74</sup> If real estate is sold in the usual way, with no unusual trouble,  $3\frac{1}{2}$  per cent. is enough commission for the executor.<sup>75</sup>

The rule applicable to cases where the statute gives commissions upon sums received and disbursed is stated in a New York case as follows: "Trustees are entitled to commissions for receiving all moneys which constitute the corpus of the estate, and any additions thereto from increase of any kind, and thus the moneys upon which commissions are to be computed can never exceed the gross amount of the estate and its net income; and the moneys paid out upon which commissions may be computed are the moneys paid out of the estate for debts, expenses of administration, to legatees or other beneficiaries, moneys which operate to diminish the estate as it exists in the hands of the trustees, and pass out of and away from the estate."<sup>76</sup>

#### *Division among Several.*

As to the division of commissions among several executors or administrators, in the absence of statutory directions upon this subject, the division should be made upon principles of equity, in such a way as to give to each a reasonable compensation for his services; and, to attain this object, it is generally presumed that, if nothing in the case leads to a different conclusion, each of the executors or administrators is entitled to an equal share of the commissions with all the others;<sup>77</sup> but if the circumstances show that one of the executors

<sup>73</sup> *Gaines v. Reutch*, 2 Atl. 913, 64 Md. 520.

<sup>74</sup> *Donat's Estate*, 15 Pa. Co. Ct. R. 379.

<sup>75</sup> *Pickering's Estate*, 4 Pa. Dist. R. 263.

<sup>76</sup> *Beard v. Beard*, 35 N. E. 488, 140 N. Y. 260.

<sup>77</sup> *Pomeroy v. Mills*, 4 Atl. 768, 40 N. J. Eq. 517.

or administrators did more work than the other, or that one has forfeited his right to commissions, or any other equitable considerations affect the distribution, it will be made in accordance with the equity of the case.<sup>78</sup> If the estate is divided up between the executors or administrators, and one administers one part, and the other another, neither intermeddling with the part of the other, each will receive commissions upon that part only which he administered.<sup>79</sup> An executor or administrator cannot receive commissions on his own debt to the estate.<sup>80</sup>

### HEARING AN ACCOUNT.

178. The rendering of an account by an executor or administrator must always be preceded by sufficient notice to the next of kin, legatees, and others interested in the estate, in whatever manner is provided by statute or by the rules of court. At the time and place notified, the account is rendered, and a hearing is had, and objections, if any, are made to its correctness. In the hearings on accounts, as in all other probate proceedings, the rule obtains that only those who are interested in the estate pecuniarily can take part in the proceedings.

#### *Who Entitled to Take Part.*

Among those who are so pecuniarily interested<sup>81</sup> are creditors, legatees, distributees, the widow or surviving husband, and former and succeeding administrators or executors.<sup>82</sup> One who has been appointed receiver of a judgment debtor, who is a legatee under a

<sup>78</sup> In re Harris, 4 Dem. Sur. (N. Y.) 463.

<sup>79</sup> In re Mansfield, 31 N. Y. Supp. 684, 10 Misc. Rep. 296.

<sup>80</sup> In re Hoffer's Estate, 27 Atl. 11, 156 Pa. St. 473.

<sup>81</sup> Dunham v. Marsh, 30 Atl. 473, 52 N. J. Eq. 256.

<sup>82</sup> In re Peters' Estate, 1 Phila. 581; Melizet's Appeal, 17 Pa. St. 449; Albertson's Estate, 1 Wkly. Notes Cas. 188; Hartman's Appeal, 90 Pa. St. 203; Lacey's Estate, 35 Leg. Int. 274; Manigle's Estate, 11 Phila. 39; Wiggin v. Swett, 6 Metc. (Mass.) 194, 197; In re Soutter, 12 N. E. 34, 105 N. Y. 514.

will, has such an interest in the estate as will enable him to compel the executor to account.<sup>83</sup> One of several executors may compel the others to account.<sup>84</sup> The interests of persons who are unborn, unascertained, or legally incompetent to act are in some states protected by the appointment of guardians ad litem.<sup>85</sup> An appeal from the allowance of an executor's or administrator's account can only be taken by some one whose pecuniary interest is directly affected by the decree,—one whose right of property may be established or divested by the decree. An administrator is so interested in the account of a preceding executor or administrator, and may appeal from the allowance of his account.<sup>86</sup> Where a person who was described in her bill as Marie Reynolds sought to compel an administrator to account, and alleged that the deceased was intestate, and that Annie Roberts and two others named were his heirs, she shows no title to compel an account, even though she alleges that, by reason of the death of the last two named, she became solely entitled to the estate.<sup>87</sup> Moreover, the same rule holds good in regard to hearings on an account as in other proceedings in the probate courts to which reference has already been made,<sup>88</sup>—that it is only necessary that the party who attempts to compel the administrator to account should make out a probability of interest in the estate, and not a complete and perfect title; for the probate court will not try titles to the estate, especially upon the preliminary question of whether the petitioner has sufficient interest to have a standing in court.<sup>89</sup> Thus, if a legatee cites the executor into court to account, and the executor tries to escape from this citation by proving a release from the legatee of all his interest in the estate, yet, if the legatee shows that this release is probably void, he will be entitled to compel the executor to account.<sup>90</sup> So, if a person claims a right as creditor to

<sup>83</sup> *In re Beyea's Estate*, 31 N. Y. Supp. 200, 10 Misc. Rep. 198.

<sup>84</sup> *In re Rumsey*, 18 N. Y. Supp. 402, 63 Hun, 635.

<sup>85</sup> Cf. ante, p. 126, c. 8.; *Id.*, p. 285, c. 16.

<sup>86</sup> *Wiggin v. Swett*, 6 Metc. (Mass.) 194, 197.

<sup>87</sup> *West v. Reynolds*, 17 South. 740, 35 Fla. 317.

<sup>88</sup> Ante, p. 126, c. 8; *Id.*, p. 285, c. 16.

<sup>89</sup> *Disston's Estate*, 14 Phila. 310.

<sup>90</sup> *Reilley v. Duffy*, 4 Dem. Sur. (N. Y.) 366.

compel an account, and does not show a *prima facie* claim, he will not be allowed to interfere.<sup>91</sup>

*Effect of Allowance of Account.*

The effect of the allowance of the account is various in different states, and a distinction is drawn between final and intermediate accounts in favor of the conclusiveness of the final accounts. If an account is allowed after a duly-notified hearing, the effect of this allowance is the same as a decree of the judge of probate; and, unless it is otherwise provided by statute, the settlement bars any one interested in the estate, who was duly notified, from afterwards contesting the account, except for fraud or manifest error or on appeal as provided by law.<sup>92</sup> But the account will be opened to correct a fraud, as, for instance, if an executor inserts in his account a sale of assets, when in fact no sale took place, and this insertion is injurious to the interests of the estate.<sup>93</sup> It is a fraud for an executor to sell assets, applying the price to payment of his own debts to the vendee, unless he sets aside a similar amount of money from his own estate, and deposits it in bank, or otherwise earmarks it, so that it can be known as belonging to the trust.<sup>94</sup> But, if the person whose estate is being administered is alive, he may set aside the account.<sup>95</sup>

In some states the statutes define precisely what the effect of such an allowance shall be. Thus, in California the allowance of an account is conclusive, except upon persons under some disability, who may impeach the account or proceed against the executor or administrator at any time before final distribution of the estate.<sup>96</sup> In Kansas and Massachusetts it is provided that if an account is settled in the absence of any person adversely interested, and without notice to him, the account may be opened on his application

<sup>91</sup> Beller's Appeal, 22 Atl. 808, 144 Pa. St. 273.

<sup>92</sup> R. I. Pub. St. c. 190, § 10; Blake v. Ward, 137 Mass. 94; Parcher v. Bussell, 11 Cush. (Mass.) 107; N. J. Revision, "Orphans' Courts," § 108; Shindel's Appeal, 57 Pa. St. 43; McLellan's Appeal, 76 Pa. St. 231; Ind. Rev. St. 1881, §§ 2402, 2403.

<sup>93</sup> Schweitzer v. Bonn (N. J. Ch.) 31 Atl. 24.

<sup>94</sup> Id.

<sup>95</sup> Jaap v. Digman, 36 N. E. 50, 8 Ind. App. 509. Compare ante, p. 30, c. 2.

<sup>96</sup> Cal. Code Civ. Proc. § 1637.

at any time within six months after the settlement, and all former accounts of the same accountant may thereupon be opened so far as to correct a mistake therein, except as to matters already disputed and settled by the court, unless the court grants leave.<sup>97</sup> And it is also provided by statute that when an executor or administrator has paid over the estate in accordance with a decree of the court, and presents an account of the same, verified by oath, and proves it to the satisfaction of the court, this account is allowed as his final discharge, and is then recorded. This discharges the executor or administrator from all liability under the decree, unless the account is impeached for fraud or manifest error.<sup>98</sup> In Mississippi the settlement may be opened at any time within two years after final settlement, and afterwards by minors or persons of unsound mind within two years from the removal of their disability.<sup>99</sup> In New York the effect of an allowance of an account of an executor or administrator is defined by statute to be conclusive upon all those persons who were duly cited or appeared, as to the following facts: (1) That the items allowed for money paid to creditors, legatees, and next of kin, or for necessary expenses, or for his services, are correct; (2) that the accounting party has been charged with all the interest upon money received by him, and embraced in the account, with which he is legally chargeable; (3) that the money charged to the accountant as collected is all that was collectible at that time on the debts stated in the account; (4) that the allowances made for decrease in the value of the property or charges for the increase were correctly made.<sup>100</sup> In Ohio the provisions of the statutes are the same as in Massachusetts and Kansas.<sup>101</sup>

It may also be stated as a general principle that, whatever latitude may be allowed in correcting the mistakes in accounts, the court will never allow any item which has been specially examined, at a hearing duly notified, to be re-examined in another proceeding, even in settling a later account of the same estate; for, after such special examination, the decree of allowance of the ac-

<sup>97</sup> Kan. Comp. Laws, c. 37, § 158; Mass. Pub. St. c. 144, § 9.

<sup>98</sup> Mass. Pub. St. c. 144, § 12.

<sup>100</sup> Code Civ. Proc. § 2742.

<sup>99</sup> Miss. Rev. Code, § 2075.

<sup>101</sup> Ohio Rev. St. §§ 6187, 6190.

count is a bar.<sup>102</sup> But, as to items which have not been so specially subjected to the scrutiny of the court, the courts, unless otherwise directed by statutory provision, are inclined to allow a revision for the purpose of correcting a manifest error, even in final accounts.<sup>103</sup> If an executor is discharged on a final account, this is merely an adjudication that the assets shown are duly distributed, and is not an adjudication that there are no other assets belonging to the estate.<sup>104</sup>

### *Accounting in Equity.*

Owing to the inability of legatees and distributees to sue at law for their respective shares and legacies, there existed in England (and in a few of the United States this practice is followed) a jurisdiction in equity in favor of these parties, and a bill in equity will lie by a creditor, legatee, or distributee to compel an accounting of the estate. When such a bill is brought, the court takes jurisdiction of the whole administration, and requires the executor or administrator to account before it. In such a case he is not obliged to account in the probate court. In most of the United States, the accounting must in all cases be in the probate court.<sup>105</sup> If accounting has already been had in the probate court, these accounts will not be revised in the court of equity.<sup>106</sup>

## FAILURE TO ACCOUNT.

**179. The failure of an executor or administrator to account at the times when he is required by law is always, at least, a technical breach of his bond; and, if he fails to account after being duly cited therefor, his bond may be put in suit; but filing the account and payment of costs will cure the breach.**

<sup>102</sup> Dey v. Codman, 39 N. J. Eq. 268; Reynolds v. Jackson, 36 N. J. Eq. 515; Jackson v. Reynolds, 39 N. J. Eq. 313; Mass. Pub. St. c. 144, § 9; Saxton v. Chamberlain, 6 Pick. (Mass.) 422; Field v. Hitchcock, 14 Pick. (Mass.) 405.

<sup>103</sup> Blake v. Pegram, 109 Mass. 541; Dey v. Codman, 39 N. J. Eq. 268; Jackson v. Reynolds, 39 N. J. Eq. 313.

<sup>104</sup> Davis v. Eastman, 30 Atl. 1, 66 Vt. 651.

<sup>105</sup> State v. Dilley, 1 Atl. 612, 64 Md. 318; Haddow v. Lundy, 59 N. Y. 320; Wager v. Wager, 89 N. Y. 161.

<sup>106</sup> Sewell v. Slingsluff, 62 Md. 594. Cf. post, as to administrator suits, p. 503, c. 23.



In some states other penalties are inflicted. For example, in Alabama the court may commit him, or may state the account from materials on file or whatever information is accessible, charging him with such assets as have come to his hands.<sup>107</sup> In California the executor or administrator may be attached as for a contempt, or his letters may be revoked.<sup>108</sup> In Florida an executor or administrator who neglects to render his accounts within the time limited by law forfeits his commissions.<sup>109</sup> And the same is true in Georgia, with the limitation that the forfeiture applies only to the year covered by the account of which no return is made, and the forfeiture may be remitted by the ordinary for cause shown.<sup>110</sup> In Illinois and Indiana he may be removed, and committed on an attachment for contempt.<sup>111</sup> In Iowa any executor failing to account when required to do so by the court forfeits \$100, to be recovered in a civil action on his bond, for the benefit of the estate, by any one interested in the estate.<sup>112</sup> In Kansas an executor or administrator, in such case, is liable to attachment and removal.<sup>113</sup> In Maryland, if the executor or administrator fails to account when duly cited, his letters may be revoked, and administration granted, at the discretion of the court; and the administrator to whom letters may be granted is entitled to put the delinquent's bond in suit, and recover such damages thereon as the jury shall find, and, in addition, 6 per cent. on the amount of the inventory from the time when the account should have been filed to the time when the verdict is given.<sup>114</sup> In Mississippi he is liable to removal and attachment for contempt, in addition to suit on his bond.<sup>115</sup> In New Jersey he is to be removed, must pay the costs of the citation, and loses his commissions and compensation.<sup>116</sup> In Ohio he may be removed, and committed on an attachment for contempt.<sup>117</sup> In

<sup>107</sup> Ala. Code, § 2155.

<sup>109</sup> McClel. Dig. c. 2, § 75.

<sup>108</sup> Cal. Code Civ. Proc. § 1627.

<sup>110</sup> Ga. Code, § 2596.

<sup>111</sup> Ill. Ann. St. (Starr & C.) c. 3, par. 114; Ind. Rev. St. § 2393.

<sup>112</sup> Iowa, Rev. Code, § 2482.

<sup>113</sup> Kan. Comp. Laws, c. 37, § 149.

<sup>114</sup> Md. Rev. Code, art. 50, § 212.

<sup>115</sup> Miss. Rev. Code, §§ 2067, 2068.

<sup>116</sup> Revision, "Orphans' Courts," § 99.

<sup>117</sup> Ohio Rev. St. § 6178.

Rhode Island he is held accountable for the full value of the personal estate, with interest, and shall have no compensation for his services.<sup>118</sup>

The failure to file an account, so far as it is a breach of a probate bond, is waived and cured by the allowance of the account, upon the certificate of all interested that it is correct, and request by them that it be allowed.<sup>119</sup>

#### ACCOUNTING BETWEEN SUCCESSIVE ADMINISTRATORS.

**180. An outgoing executor or administrator, before the estate is settled, should render an account stating a balance due to or by him to the estate, and should turn over the balance, if due by him to the estate, to the succeeding administrator. In case of the death of the executor or administrator, the same should be done by his executor or administrator. If a balance is due to the estate, and is not turned over to the succeeding administrator, he may sue for it. If an account is not rendered, as required, the succeeding administrator may compel it.**

There is no privity of estate between successive administrators or their representatives;<sup>120</sup> and a succeeding administrator *de bonis non* becomes, by virtue of his appointment, the representative of the estate, so that he is entitled to call the preceding executor or administrator or his representatives to account, and to intervene in all proceedings in which such accounts are being settled.<sup>121</sup> The most regular way of completing the transfer of the estate and settling the rights of all parties is for the outgoing executor or administrator or his representatives to present a final account of the estate, crediting him with the balance paid over to his successor, if any is found due and paid, or with the balance due

<sup>118</sup> R. I. Pub. St. c. 190, § 3.

<sup>119</sup> *Loring v. Kendall*, 1 Gray (Mass.) 305.

<sup>120</sup> *Wiggin v. Swett*, 6 Metc. (Mass.) 197. Cf. ante, p. 129, c. 9.

<sup>121</sup> *Wiggin v. Swett*, 6 Metc. (Mass.) 197; *Munroe v. Holmes*, 13 Allen (Mass.) 109; *Buttrick v. King*, 7 Metc. (Mass.) 20; *Sewall v. Patch*, 132 Mass. 326.

to him, if he has advanced money to the estate, or debiting him with the balance due by him to the estate.<sup>122</sup> At the settlement of this account, the administrator de bonis non has a right to be a party, and to object to any items of the account, and secure its correctness.<sup>123</sup> When the statute requires an outgoing executor or administrator to account to his successor, a resigning executor can make no final accounting until his successor is appointed.<sup>124</sup>

*Remedies of Succeeding Administrator.*

If a balance is found due from the former executor or administrator to the estate, the judge of probate will make an order that that amount be paid to the administrator de bonis non; and upon that decree the administrator may have an action of contract against the outgoing executor or administrator, or his representatives, or he may have an action on his administration bond, against him or them or his sureties. He is not limited by election of one of these remedies, and he may sue on the administration bond, and get judgment, and then sue on the decree of the court.<sup>125</sup> Besides these remedies, he could have in most states an order from the probate judge requiring the outgoing administrator to pay over all the estate to his successor, under the same penalty as the court usually has to enforce its decrees.<sup>126</sup> The preceding remedies are all based upon the accounting between the parties and the ascertainment of a balance due. But the remedies of the administrator de bonis non are not entirely dependent upon the account. He cannot, however, have a bill in equity to compel the outgoing executor or administrator or his representatives to account, in those states where administration accounts are to be made in the probate court only.<sup>127</sup> If, however, without any accounting, the administrator de bonis non can show a clear debt from the former executor or administrator, either of a balance due to the estate or of any specific sum of money which can be definitely ascertained, the admin-

<sup>122</sup> *Storer v. Storer*, 6 Mass. 390.

<sup>123</sup> *Wiggin v. Swett*, 6 Metc. (Mass.) 197.

<sup>124</sup> *Emmons v. Gordon*, 28 S. W. 863, 125 Mo. 636.

<sup>125</sup> *Storer v. Storer*, 6 Mass. 390.

<sup>126</sup> Mass. Pub. St. c. 156, §§ 14, 31.

<sup>127</sup> *Ammidown v. Kinsey*, 12 N. E. 365, 144 Mass. 587; *Foster v. Foster*, 134 Mass. 120.

istrator de bonis non may have an action at law of contract for money had and received against the former executor or administrator or his representatives to compel the payment of this money by them.<sup>128</sup> And if, although the amount due to the estate is definite, yet there is some act of transfer to be done besides the mere payment of money, it seems that the administrator de bonis non may have a bill in equity to enforce the performance of this act by the former executor or administrator or his representatives.<sup>129</sup>

In those states where probate accounts are cognizable only in probate courts, and not in courts of equity, the administrator de bonis non cannot, except in the instance above specified, proceed in equity. Another remedy is open to the administrator de bonis non, without any accounting, when, as has just been said, a clear debt is due from an outgoing executor or administrator to the estate; and that is by an action on his probate bond, in which action, indeed, it is necessary to settle a certain kind of probate account in order to arrive at the damages due to the plaintiff by the failure to account, and pay over.<sup>130</sup> But it may be said generally that, unless the estate has been substantially settled, the remedy is in the probate court.<sup>131</sup> Still another remedy exists for the administrator de bonis non, or, rather, a different form of one which has before been mentioned; and that is that, if the preceding executor or administrator died while in office, the administrator de bonis non may prove the debt in the settling of the estate of the deceased executor or administrator;<sup>132</sup> or, if the former executor or administrator has wrongfully delivered any portion of the estate over to another, the administrator may have in appropriate cases either trover against the party so receiving for such part of the estate, or contract for money had and received.<sup>133</sup> Furthermore, the administrator de bonis non can hold the funds of the estate against

<sup>128</sup> Sewall v. Patch, 132 Mass. 326; Buttrick v. King, 7 Metc. (Mass.) 20.

<sup>129</sup> Buttrick v. King, 7 Metc. (Mass.) 20.

<sup>130</sup> White v. Ditson, 4 N. E. 606, 140 Mass. 351.

<sup>131</sup> White v. Ditson, 4 N. E. 606, 140 Mass. 351; Ammidown v. Kinsey, 12 N. E. 365, 144 Mass. 587.

<sup>132</sup> Minot v. Norcross, 9 N. E. 662, 143 Mass. 326.

<sup>133</sup> Stevens v. Goodell, 3 Metc. (Mass.) 34.

a suit by a personal creditor of the removed administrator, who trustees the proceeds of a sale of real estate deposited by the original administrator with his counsel, if the proceeds so deposited can be identified.<sup>134</sup>

*Liability for Proceeds of Real Estate.*

A question has been raised as to the liability of an executor to a succeeding administrator de bonis non for the proceeds of real estate sold under a power in a will. In several cases which all arose under one will, the executor paid all debts and legacies and costs of administration, and held a residue, composed partly of personal estate, and partly of the proceeds of real estate sold under a power in the will. The executor died without having filed a final account. An administrator de bonis non of the original estate was appointed, and brought suit against the sureties on the bond of the executor for the residue of the estate, and recovered so much of the residue as was composed of the personal estate; but the court held that, under the bond given,—that is, “to administer, according to law and the will, all goods, chattels, rights, and credits, and the proceeds of all his real estate that may be sold for the payment of his debts and legacies,”—the sureties were not liable for the proceeds of the real estate, and that the word “legacies” meant specific legacies, and not residuary legacies.<sup>135</sup> The administrator de bonis non then proved the claim for the balance of the residue arising from the sale of the real estate in the probate court, in the settlement of the estate of the deceased executor, and the claim was allowed on appeal; the court saying that it by no means followed, because the sureties were not liable on the bond for the proceeds of the real estate sold under a power in the will, that the executor was not bound to account for such proceeds as part of the estate of the deceased testator, which he was bound to administer according to law and the will.<sup>136</sup> And it may be considered as settled law that the administrator de bonis non may recover the proceeds of real estate, as well as personal estate, from the repre-

<sup>134</sup> Marvel v. Babbitt, 9 N. E. 566, 143 Mass. 226. Cf. post, p. 495, c. 23.

<sup>135</sup> White v. Ditson, 4 N. E. 606, 140 Mass. 358.

<sup>136</sup> Minot v. Norcross, 9 N. E. 662, 143 Mass. 327.

sentatives of a deceased executor or administrator, or from an executor or administrator who has resigned or been removed.<sup>137</sup>

*Balance Due Outgoing Executor or Administrator.*

In the foregoing discussion, the cases have all been those in which the outgoing executor or administrator owed something to the estate which he had been administering, and therefore cases in which he or his representatives have been made liable to the administrator de bonis non. Cases occur, however, in which the estate owes the outgoing executor or administrator; as, for instance, where he has advanced money to the estate, as in some cases he may properly do.<sup>138</sup> These advances would naturally be settled by retainer by the outgoing executor or administrator or his representatives of funds enough belonging to the estate to satisfy the debt; but it may be that the personal estate is insufficient for that purpose, and then these advances become a charge upon whatever new assets come into the hands of the administrator de bonis non, even upon the proceeds of real estate sold by him to pay debts; and this charge is not barred by the statute of limitations.<sup>139</sup> Questions have arisen as to the manner of enforcing this charge. It cannot be asserted by an action at law on an implied contract brought after settling the account of the first executor in the probate court, and ascertaining the amount due to him.<sup>140</sup> The matter must be settled in some manner in the probate court; and the necessary relief has been said to be obtainable by a citation of the administrator de bonis non to account, upon which citation there would be a hearing, at which the representative of the deceased executor or administrator might ask for an order for the payment of his claim; and, if there is estate in the hands of the administrator de bonis non, the amount will be paid.<sup>141</sup>

If the executor or administrator was a debtor of the estate previous to being executor or administrator, the debt is extinguished

<sup>137</sup> *Minot v. Norcross*, 9 N. E. 662, 143 Mass. 327; *Marvel v. Babbitt*, 9 N. E. 566, 143 Mass. 226.

<sup>138</sup> *Ante*, p. 260, c. 15.

<sup>139</sup> *Munroe v. Holmes*, 13 Allen (Mass.) 112.

<sup>140</sup> *Munroe v. Holmes*, 9 Allen (Mass.) 244.

<sup>141</sup> *Munroe v. Holmes*, 13 Allen (Mass.) 112.

by his taking the office, and does not revive after his death, resignation, or removal, and he cannot be sued by the administrator *de bonis non*.<sup>142</sup> So, if he was a creditor of the estate previous to accepting the office, his claim is extinguished by his taking the office; and he cannot, after his resignation, sue the administrator *de bonis non* for his claim.<sup>143</sup> His only way of collecting his claim is by retaining it out of the assets in his hands while he is still executor or administrator.

<sup>142</sup> *Tarbell v. Jewett*, 129 Mass. 464. Cf. ante, p. 242, c. 14.

<sup>143</sup> *Prentice v. Dehon*, 10 Allen (Mass.) 354. Cf. ante, p. 333, c. 17.





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. Part IV.

TERMINATION OF OFFICE.

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## CHAPTER XXI.

## REVOCATION OF LETTERS—REMOVAL—RESIGNATION.

- 181. Causes for Revocation or Removal.
- 182-183. Proceedings for Revocation or Removal.
- 184. Resignation of Executor or Administrator.

## CAUSES FOR REVOCATION OR REMOVAL.

181. An executor or administrator will be removed
- (a) Upon the application of one having a prior right to administer, unless he has waived or lost the right.
  - (b) Upon the discovery of a will, or a later will than the one proved.
  - (c) For disqualifications which would prevent appointment.
  - (d) For misconduct, or refusal to obey orders of probate court, such as
    - (1) Waste or mismanagement.
    - (2) Failure to give bond.
    - (3) Failure to make and file inventory.
    - (4) Failure to account.
    - (5) Fraud in obtaining appointment.

*Application of One Having Prior Right.*

As the right to administer upon an intestate estate is regulated by statute, as has been previously seen,<sup>1</sup> it follows that any person who is entitled to administration may, if he has not lost the right by his own act,<sup>2</sup> as waiving or renouncing it, or by negligence in not claiming it when he ought, or not applying when cited, apply for the revocation of letters which have been granted to another wrongfully.<sup>3</sup>

<sup>1</sup> Ante, p. 35, c. 4; Id. p. 50, c. 5.

<sup>2</sup> Keane's Estate, 56 Cal. 407.

<sup>3</sup> Wooten's Estate, 56 Cal. 322; Estate of Li Po Tai, 41 Pac. 486, 108 Cal. 484; State v. Collier, 1 Mo. App. Rep'r, 718.

*Will or Later Will.*

The same principle applies in cases where, after an executor is duly appointed, a later will is found and duly proved, appointing another executor, or where, after an administrator has been appointed as if the estate were intestate, a valid will is found and proved, in which cases the letters wrongfully granted will be revoked.<sup>4</sup> The question arises whether, when administration is granted as upon an intestate estate, and it afterwards appears that a will was left by the deceased, or when administration is granted to one not entitled to it, the grant of administration is ipso facto made void by the discovery of the will, on the application of the person entitled, or whether it is only voidable. The rule of the English probate courts seems to have been that any grant which is in derogation of the right of an executor is void, and, therefore, that the administration is made void, even as to previous acts of administration, by the appointment of the executor. Mr. Williams says on this point, "It may, perhaps, be laid down, as a general test whether an administration is void or voidable, that when the grant is in derogation of the right of an executor it is void, but where the administration is granted by the proper jurisdiction, and is only in derogation of the right of the next of kin or residuary legatee, it is merely voidable."<sup>5</sup>

The difference in result upon the acts of the administrator is apparent, for, if his appointment is void, his acts are without authority. It is, however, often provided by statutes that, when letters of administration are revoked, all previous sales, whether of real or personal estate, lawfully made by the administrator, and with good faith on the part of the purchaser, and all other lawful acts done by such administrator, remain valid and effectual.

In the United States, as has been previously seen, the executor and administrator stand on the same footing, or nearly so, before

<sup>4</sup> Ark. Dig. St. § 30; Ala. Code 1876, §§ 2414, 2415; Cal. Code Civ. Proc. § 1423; Ill. Ann. St. (Coth.) c. 3, §§ 28, 29; Md. Rev. Code, art. 50, § 48; Mich. Ann. St. § 5862; N. Y. Code Civ. Proc. § 2684; Ohio Rev. St. § 6019; *Rebhan v. Mueller*, 2 N. E. 75, 114 Ill. 343. So a temporary administrator, appointed during the absence of an executor from the state, may be removed when the executor returns. *Este's Estate*, 2 Mo. App. Rep'r, 1139.

<sup>5</sup> Williams, *Ex'rs*, 590.

appointment;<sup>6</sup> and it would seem that in both cases the appointment is merely voidable, and that, until proceedings are duly taken to have it revoked, it stands valid, and cannot be attacked collaterally.<sup>7</sup>

### *Disqualifications.*

The same personal disqualifications which would prevent the appointment of an executor or administrator to the office, and which have been previously enumerated,<sup>8</sup> will prove sufficient reason for his removal, if occurring after his appointment.<sup>9</sup> Thus, idiocy or insanity is a sufficient cause for removal,<sup>10</sup> and, in some states, habitual intemperance or gross drunkenness.<sup>11</sup> So is continued sickness, disqualifying him for the duties of the office.<sup>12</sup> And one who is convicted of an infamous crime is, in some states, made liable to removal.<sup>13</sup> Insolvency alone, if it does not give ground for apprehending waste or loss to the estate, has been held in New Jersey not to be sufficient cause for revoking administration.<sup>14</sup> But the opposite is held in Pennsylvania,<sup>15</sup> and is probably the better rule, as in case of appointment.<sup>16</sup> Removal from the state is in some states a sufficient cause for removal from office, as nonresidence is a dis-

<sup>6</sup> Ante, p. 247, c. 15.

<sup>7</sup> See ante, p. 19, c. 1; Id. p. 99, c. 6; *Haynes v. Meeks*, 20 Cal. 310; *Vail v. Male*, 37 N. J. Eq. 521.

<sup>8</sup> See ante, p. 96, c. 6.

<sup>9</sup> *Levering v. Levering*, 2 Atl. 1, 64 Md. 410; N. Y. Code Civ. Proc. § 2685; Cal. Code Civ. Proc. § 1436; Conn. Laws 1885, c. 110, § 28. See ante, p. 96, c. 6.

<sup>10</sup> Ala. Code 1876, § 2386; Ill. Ann. St. (Coth.) c. 3, § 30; Iowa Rev. Code, § 2496; Me. Rev. St. c. 64, § 21; Mass. Pub. St. c. 132, § 14; Mich. Ann. St. §§ 5843, 5858; N. H. Gen. Laws, c. 195, § 10; N. Y. Code Civ. Proc. § 2685; Ohio Rev. St. § 6017; Brightly, *Purd. Pa. Dig. "Decedents' Estates,"* § 253; R. I. Pub. St. c. 184, § 24; Vt. Rev. Laws, § 2074. And see ante, p. 103, c. 6.

<sup>11</sup> Ala. Code 1876, § 2386; Ill. Ann. St. (Coth.) c. 3, § 30; N. Y. Code Civ. Proc. § 2685; Brightly, *Purd. Pa. Dig., "Decedents' Estates,"* § 253; *In re Cady's Estate*, 36 Hun (N. Y.) 122. And see ante, p. 105, c. 6.

<sup>12</sup> Ala. Code 1876, § 2386; N. H. Gen. Laws, c. 195, § 10; *Babbitt v. Babbitt*, 26 N. J. Eq. 54.

<sup>13</sup> Ill. Ann. St. (Coth.) c. 3, § 30. See ante, p. 109, c. 6.

<sup>14</sup> *Schanck v. Schanck*, 7 N. J. Eq. 151.

<sup>15</sup> *Edwards' Estate*, 5 Wkly. Notes Cas. 431; *Greentree's Estate*, 3 Wkly. Notes Cas. 519.

<sup>16</sup> See ante, p. 108, c. 6.

qualification for appointment.<sup>17</sup> In many states a broad discretion is given to the judge of probate to remove any executor or administrator whenever he becomes unsuitable to perform the duties of the office, either because his character or relations, business or social, have become such as to render it improbable that he can fulfill the duties of his office as they should be performed.<sup>18</sup>

*Waste and Mismanagement.*

Wasting or embezzling the estate, or mismanaging it, or committing a fraud on those entitled to the estate,<sup>19</sup> or neglecting the duties of the office,<sup>20</sup> is cause for removal. Thus, if an executor who is empowered, under the will, to sell real estate, in his discretion, neglects so to do, or acts in bad faith, his conduct is a waste such as is ground for his removal.<sup>21</sup> So if he convey part of the estate to his sureties to indemnify them for liability on his probate bond.<sup>22</sup> The fact that the administrator is a creditor of the estate is not ground for removal, but, perhaps, if the estate is insolvent and his claim is doubtful, the court might remove him, if it has authority to remove any "unsuitable" administrator.<sup>23</sup>

<sup>17</sup> Of an administrator only. Ala. Code 1876, § 2386; Cal. Code Civ. Proc. § 1436; Ill. Ann. St. (Coth.) c. 3, § 31; Mich. 2 Ann. St. §§ 5842, 5858; (absence) N. H. Gen. Laws, c. 195, § 10; N. J. Revision, "Orphans' Courts," § 127; N. Y. Code Civ. Proc. § 2685; Sohn's Estate, N. Y. 1 Civ. Proc. R. 373; Brightly, *Purd. Pa. Dig. "Decedents' Estates,"* § 254; Vt. Rev. Laws, § 2074. See, also, ante, p. 110, c. 6.

<sup>18</sup> Mass. Pub. St. c. 132, § 14; *Stearns v. Fiske*, 18 Pick. (Mass.) 24; *Winship v. Bass*, 12 Mass. 198; *Kellberg's Appeal*, 86 Pa. St. 133; Ga. Code, § 2511; Iowa Rev. Code (Miller) § 2496; Me. Rev. St. c. 64, § 21; Mich. 2 Ann. St. §§ 5842, 5858; Ohio Rev. St. § 6017; R. I. Pub. St. c. 184, § 24; Vt. Rev. Laws, § 2074. Cf. ante, p. 116, c. 6.

<sup>19</sup> Cal. Code Civ. Proc. § 1436; *Deck v. Gherke*, 6 Cal. 667; Conn. Laws 1835, c. 110, § 28; Ga. Code, § 2511; Ill. Ann. St. (Coth.) c. 3, § 30; Iowa Rev. Code (Miller) § 2496; Me. Rev. St. c. 64, § 21; N. H. Gen. Laws, c. 195, § 10; N. Y. Code Civ. Proc. § 2685; Brightly, *Purd. Pa. Dig. "Decedents' Estates,"* §§ 249, 257; *In re Carter's Estate* (Sup.) 38 N. Y. Supp. 1083; *In re Havemeyer*, 38 N. Y. Supp. 292, 3 App. Div. 519.

<sup>20</sup> See statutes supra, note 19; *Cox v. Chalk*, 57 Md. 569; N. Y. Code Civ. Proc. §§ 2807, 2817.

<sup>21</sup> *Haight v. Brisbin*, 3 N. E. 74, 100 N. Y. 219, and 96 N. Y. 132.

<sup>22</sup> *Fleet v. Simmons*, 3 Dem. Sur. (N. Y.) 542. As to what are acts of waste, see ante, p. 254, c. 15.

<sup>23</sup> *Murray v. Angell*, 19 Atl. 246, 16 R. I. 692.

In a recent case in Massachusetts an administratrix was removed for not joining in a suit for the redemption of a mortgage. The facts were that the estate had been settled as insolvent, the administratrix not knowing of the bond of defeasance upon which the alleged right of redemption existed, and which was not discovered till after she had thus settled the estate. The creditors claimed that this right of redemption constituted new assets, which might be distributed among the creditors; and, as the administratrix refused to join in the suit to redeem this right, they asked for her removal, which was granted.<sup>24</sup> But in a similar case in New York it was held that the administratrix should not be removed, but that the creditors should, on her refusal to join, make her a party defendant.<sup>25</sup> For further discussion of what constitutes waste or mismanagement of the estate, the reader is referred to the chapter on "Management of the Estate."

Proceedings for the removal of an executor or administrator for apprehended waste are often framed alternatively; that is, that he shall be removed if he does not give sufficient security against such waste, or that he shall give security against waste, under penalty of being removed if he does not.<sup>26</sup>

A failure to give bond is, in some states, a sufficient cause for the removal of an executor or administrator from his office.<sup>27</sup> So a failure to give supplementary bond is cause for removal.<sup>28</sup>

*Failure to Give Bond, Make Inventory, etc.*

A failure to make and file a proper inventory of the estate, according to the condition of the bond, is in some states a reason for removing an executor or administrator from his office.<sup>29</sup>

<sup>24</sup> *Glines v. Weeks*, 137 Mass. 547. Cf. ante, p. 212, c. 14.

<sup>25</sup> *In re Moulton's Estate*, 10 N. Y. Supp. 717, 57 Hun, 589.

<sup>26</sup> *Carpenter v. Gray*, 32 N. J. Eq. 692. See ante, p. 184, c. 12.

<sup>27</sup> See statutes post, note 28; *Aldridge v. McClelland*, 34 N. J. Eq. 237; and ante, p. 187, c. 12.

<sup>28</sup> Ala. Code, §§ 2385, 2387; Cal. Code Civ. Proc. §§ 1400, 1405; Ill. Ann. St. (Coth.) c. 3, § 32; Iowa Rev. Code, § 2496; Me. Rev. St. c. 64, § 49; Md. Rev. Code, art. 50, § 68; N. J. Revision, "Orphans' Courts," § 126; *National Bank of Troy v. Stanton*, 116 Mass. 435.

<sup>29</sup> *In re Graber's Estate* (Cal.) 44 Pac. 165; Ala. Code, § 2386; Ga. Code, § 2523; Iowa Rev. Code, § 2496; N. J. Revision, "Orphans' Courts," § 126; Ohio Rev.

A failure to account when properly cited for the purpose, or, in general, a failure to obey any valid order of the court in regard to the administration, is also generally considered to be a cause for removal.<sup>30</sup>

### *Fraud.*

Fraud always vitiates a grant of letters, and in any state, either by statute or by common law, letters will be revoked if it is proved that they were obtained on any false pretense, or by fraud;<sup>31</sup> but the false pretense must have been made to the court whose action was desired, and not to a party to the proceedings, merely to influence his action.<sup>32</sup>

## PROCEEDINGS FOR REVOCATION OR REMOVAL.

182. Proceedings for the revocation of letters, or the removal of an executor or administrator from office, must follow statutory requirements. The revocation or removal cannot be made without notice to him, and a hearing.
183. Application for the revocation or removal must be made by some one financially interested in the estate, and he must at the hearing show a *prima facie* case of interest.

The removal of an executor or administrator is only made after notice to him, and a hearing,<sup>33</sup> and it is his duty, when so removed,

St. § 6017; Brightly, *Purd. Pa. Dig. "Decedents' Estates,"* §§ 249, 257; *In re Carter's Estate* (Sup.) 38 N. Y. Supp. 1083; *Carey v. Reed* (Md.) 33 Atl. 633. See ante, p. 198, c. 13.

<sup>30</sup> Ala. Code, § 2386; Ga. Code, § 2511; Iowa Rev. Code, § 2496; Me. Rev. St. c. 64, § 21; Md. Rev. Code, art. 50, § 212; *Biddison v. Mosely*, 57 Md. 89; Mich. Ann. St. §§ 5842, 5858; Mass. Pub. St. c. 132, § 14; N. J. Revision, "Orphans' Courts," § 126; Ohio Rev. St. § 6017; R. I. Pub. St. c. 184, § 24; Vt. Rev. Laws, § 2074; Brightly, *Purd. Pa. Dig. "Decedents' Estates,"* §§ 249, 257.

<sup>31</sup> Ill. Ann. St. (Coth.) c. 3, § 26; *Wernse v. Hall*, 101 Ill. 423; N. Y. Code Civ. Proc. § 2685; *In re West*, 40 Hun, 291; *Proctor v. Wanmaker*, 1 Barb. Ch. (N. Y.) 302; *Worthington v. Gittings*, 56 Md. 549.

<sup>32</sup> *Corn v. Corn*, 4 Dem. Sur. (N. Y.) 397.

<sup>33</sup> See statutes cited in this chapter; *Levering v. Levering*, 2 Atl. 1, 64 Md. 410.



to pay over all the estate to the successor appointed by the probate court, and the court may enforce this payment by order and attachment for contempt, if the order is not obeyed.<sup>34</sup>

The application for removal can only be made by some one interested in the estate, or by his agent, or an attorney at law for him.<sup>35</sup> Only slight preliminary proof of interest is required,<sup>36</sup> unless the fact is disputed; but the respondent in such case cannot, by merely denying the interest, preclude a hearing upon the question of his removal.<sup>37</sup>

It has been said that if the interest is sworn to by the party making the application, and is *prima facie* valid and legal, the court will not try the question of right.<sup>38</sup> Or the court may allow the parties to give evidence at the hearing both upon the interest and on the general question of removal, and may then decide whether the applicant has made out a *prima facie* case of interest which is not rebutted, and if this appears the court will allow him to prevail, if he makes out a proper case for removal; for in this as in other cases<sup>39</sup> the probate court does not pretend to try titles to property, but need only be satisfied that the title is probable.<sup>40</sup> On the other hand, if the whole evidence at the hearing upon the application for removal shows that the applicant has no interest, the application will be dismissed.<sup>41</sup> One who is a debtor to the estate is not one interested in it;<sup>42</sup> but a legatee and executor under a will which has been de-

The burden of proof of misconduct is on the party asking for the removal. *Schlagger's Estate*, 4 Pa. Dist. R. 495.

<sup>34</sup> See statutes *supra*, and *Pinney v. Barnes*, 17 Conn. 426, 428; *Biddison v. Story*, 57 Md. 96; *Aldridge v. McClelland*, 34 N. J. Eq. 237; *Tome's Appeal*, 50 Pa. St. 285; Mass. Pub. St. c. 156, §§ 15, 31.

<sup>35</sup> *Biddison v. Mosely*, 57 Md. 95. Cf., also, as bearing on the rule that interested parties only can apply for the action of the probate court, *ante*, p. 126, c. 8; *Id.* p. 285, c. 16; and *supra*, note 3.

<sup>36</sup> *Biddison v. Mosely*, *supra*.

<sup>37</sup> *Susz v. Forst*, 4 Dem. Sur. (N. Y.) 346.

<sup>38</sup> *Cotterell v. Brock*, 1 Bradf. Sur. (N. Y.) 148; *Merchant's Will*, 1 Tuck. (N. Y.) 17.

<sup>39</sup> See *ante*, p. 126, c. 8; *Id.* p. 416, c. 20.

<sup>40</sup> *Woodruff v. Woodruff*, 3 Dem. Sur. (N. Y.) 505; *Brackett v. Williams*, 110 Mass. 550.

<sup>41</sup> *Woodruff v. Woodruff*, 3 Dem. Sur. (N. Y.) 505.

<sup>42</sup> *Drexel v. Berney*, 1 Dem. Sur. (N. Y.) 163.

clared void has, pending an appeal from the decree, such interest as will allow him to apply for the removal of an administrator appointed in the estate.<sup>43</sup>

#### RESIGNATION OF EXECUTOR OR ADMINISTRATOR.

184. Provision is generally made by statute for the resignation by an executor or administrator of the office to which he has been appointed, and, if the circumstances of the case show that he can do so without detriment to the estate, he is allowed to resign. In the absence of statutes, if he petitions to be discharged, the court, viewing him as a trustee, will, upon notice to all parties interested, or who might become interested, in the estate, and their consent, or in default of cause shown to the contrary, allow him to be discharged under the ordinary law of trustees.

Statutes as to the resignation of an executor or administrator exist in many states.<sup>44</sup> If there is no statute applicable, the court will treat him as a trustee, in passing upon his resignation.<sup>45</sup> A resignation, when it has been duly accepted by the probate court, has the effect of a revocation of letters of the person who resigns, and either leaves the office vacant, or throws the duties upon the other incumbents, if there are any such.<sup>46</sup> Nor can he afterwards retract his

<sup>43</sup> *Newhouse v. Gale*, 1 Redf. Sur. (N. Y.) 217.

<sup>44</sup> Ala. Code 1876, § 2408; Cal. Code Civ. Proc. § 1427; Conn. Laws 1885, c. 110, § 28; Ill. Ann. St. (Coth.) c. 3, § 40; United States Rolling-Stock Co. v. Potter, 48 Iowa, 56; Me. Rev. St. c. 64, § 21; Md. Rev. Code, art. 50, § 96; Mass. Pub. St. c. 132, § 16; Mich. Ann. St. § 5858; N. H. Gen. Laws, c. 195, § 11; N. J. Revision, "Orphans' Courts," 125; N. Y. Code Civ. Proc. § 2689; Ohio Rev. St. § 6015; R. I. Pub. St. c. 184, § 25; Brightly, *Purd. Pa. Dig. "Decedents' Estates,"* § 247.

<sup>45</sup> *In re Van Wyck*, 1 Barb. Ch. (N. Y.) 567. Cf. *Thayer v. Homer*, 11 Metc. (Mass.) 104. It has been held in England that an administrator, after appointment, could not be allowed to withdraw, even before administration had been actually entered upon. *Goods of Heslop*, 5 Notes of Cas. 2.

<sup>46</sup> Ala. Code, §§ 2412, 2413; *Marsh v. People*, 15 Ill. 284.

resignation, and be reappointed.<sup>47</sup> But he and his sureties remain liable for the assets in his possession which he does not deliver over to the proper persons,<sup>48</sup> and he must account for the assets fully, although his resignation was accepted pending an accounting.<sup>49</sup>

The right of resignation, when given by statute, should be allowed only in cases in which the statute permits it, although in many cases the statute leaves the acceptance of the resignation largely in the discretion of the probate judge.<sup>50</sup> The wrongful acceptance of the resignation by the court, even when a resignation is not authorized by statute, is an irregularity only, and does not, in a collateral proceeding, make the appointment of a new administrator void.<sup>51</sup> It is generally provided, either by statute or by the orders or practice of the court, that notice shall be given to all persons interested in the estate before a resignation is accepted, or an application to be discharged is allowed. If such notice is required, and is not given, and no reason is shown why it should be dispensed with, the acceptance of the resignation is irregular, and will be revoked on appeal.<sup>52</sup>

<sup>47</sup> *In re Suarez*, 3 Dem. Sur. (N. Y.) 164; *In re Dearing*, 4 Dem. Sur. (N. Y.) 81.

<sup>48</sup> Ala. Code, § 2409. Cf. ante, p. 420, c. 20.

<sup>49</sup> *Slagle v. Entrekin*, 10 N. E. 675, 44 Ohio St. 637. Cf. *Dunaway v. Campbell*, 59 Ill. App. 665.

<sup>50</sup> *Haynes v. Meeks*, 10 Cal. 110; *Flinn v. Chase*, 4 Denio (N. Y.) 85; *In re Van Wyck*, 1 Barb. Ch. (N. Y.) 568. Cf. statutes cited in note 44.

<sup>51</sup> *Haynes v. Meeks*, 20 Cal. 310. Cf., as to collateral attack upon decrees of court, ante, p. 19, c. 2.

<sup>52</sup> *Vail v. Male*, 37 N. J. Eq. 521.



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Part V.

REMEDIES.

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## CHAPTER XXII.

### ACTIONS BY EXECUTORS AND ADMINISTRATORS.

- 185-186. Power to Bring Suit before Probate or Grant of Letters.
- 187. Survival of Actions—Contracts.
- 188-191. Torts—Replevin and Detinue.
- 192. Statutes in the United States.
- 193. Death by Wrongful Act.
- 194. After-Accruing Rights.
- 195. Actions Begun before Death.
- 196. Suits—When in Personal and When in Representative Capacity.
- 196a. Proceedings in Equity.
- 196b. Suit for Partnership Accounting.
- 196c. Actions by Personal Representatives of Mortgagor and Mortgagee.
- 196d. Suits on Note Payable to Bearer.

### POWER TO BRING SUITS BEFORE PROBATE OR GRANT OF LETTERS.

- 185. As against a mere wrongdoer, either an executor or an administrator may bring and maintain an action for any injury to personal estate which is in his actual possession, or is taken therefrom, even before his appointment by the court; for these actions are in their nature possessory, and a prima facie case is made out by showing mere possession, and injury or conversion. And, if the property has been converted and sold, he may waive the tort and sue in contract, for money had and received, for the value of the property converted or taken away.
- 186. As against persons claiming title to goods taken from the estate, the executor or administrator must be prepared at the trial to show his title by his letters; and the same is true of any case where he relies upon a constructive possession, never having had the actual possession; for the constructive posses-

sion, even as against a wrongdoer, depends upon the title, which must be proved at the trial by the letters.

The executor or administrator, before appointment, often has in his possession property belonging to the estate, and in such a case he may bring any suit which is for damages done to the possession merely, such as trover, trespass, or replevin; for the actual possession is the basis of the action, and, if the injury to the possession is done by a person having no title to the property, the executor or administrator will recover judgment on his possessory title.<sup>1</sup> For the same reason, he may waive the tort, if the property has been converted, and sue in contract, on an implied agreement on the part of the wrongdoer to pay for the property which he has converted.<sup>2</sup> Such actions would in most cases be a complete defense of the possession of the property, since, if the goods belonged to the estate, no other person would have any better title than the executor or administrator; but if the goods were claimed by the party against whom the action is brought, as his own, the executor or administrator would fail in his action, as he could not prove his title to the property by letters, since these were not yet granted.<sup>3</sup>

As to goods which have never been in his possession, or which others claim by an apparently good title, the principle of the English law, that an executor gets his title from the will, while an administrator gets his from the grant of letters, results in the rule in England that, while an administrator cannot begin a suit for such goods till the grant of letters, an executor may begin a suit before probate, and it is sufficient if he is prepared with his letters at the trial of the case. And this is true in cases where he has never had the actual possession of the goods, because his title as executor draws to it the constructive possession of the goods, which

<sup>1</sup> Hatch v. Proctor, 102 Mass. 353; Williams, Ex'rs, 305; Hutchins v. Adams, 3 Me. 174. Cf., as to the powers of an executor or administrator before appointment, ante, p. 247, c. 15.

<sup>2</sup> Hatch v. Proctor, 102 Mass. 353; Williams, Ex'rs, 305, 306, 308, 309.

<sup>3</sup> Rand v. Hubbard, 4 Metc. (Mass.) 256, 261. Cf. ante, p. 247, c. 15.



will be sufficient to support the action, and may be proved at the trial by the probate of the will;<sup>4</sup> and the same principles apply to bills in equity.<sup>5</sup> But in the United States any suit by an executor which is based upon a title in him as executor, except as above stated in regard to goods in his actual possession, must be brought after the probate court has granted his letters; and the same is true as to suits by an administrator.<sup>6</sup> In England it is held that an administrator may file a bill in equity before he has obtained grant of letters, if he alleges in the bill that the letters have been granted to him, and produces the letters at the hearing.<sup>7</sup> The inability of an executor or administrator to sue in a state in which he has not obtained a grant of letters has been already considered.<sup>8</sup>

Cases arise where it is necessary for the protection of the property that some one should collect and guard it, to preserve it for administration; no person yet having been appointed administrator, and there being urgent need of such preservation. In such a case, on application of a creditor, or, presumably, of any one interested in the estate, a court of equity will appoint a receiver to collect the property and preserve it for the duly-appointed administrator.<sup>9</sup> Such receiver, or an administrator pendente lite, may sue for and recover the property, even though it has never been in his possession.

#### SURVIVAL OF ACTIONS—CONTRACTS.

**187. Personal actions founded upon contract survive the death of either contractor, and his executor or administrator may sue after his death for breaches occurring before or after his death.**

<sup>4</sup> *Rand v. Hubbard*, 4 Metc. (Mass.) 256, 261; *Pelletreau v. Rathbone*, 1 N. J. Eq. 331; *Hunt v. Stevens*, 3 Taunt. 113; *Blainfield v. March*, 7 Mod. 141; *Williams, Ex'rs*, 305, 306, 308, 309.

<sup>5</sup> *Humphreys v. Humphreys*, 3 P. Wms. 351; *Newton v. Railway Co.*, 1 Drew. & S. 583.

<sup>6</sup> *Rand v. Hubbard*, 4 Metc. (Mass.) 256, 261. Cf. ante, notes 1, 2.

<sup>7</sup> *Humphreys v. Ingledon*, 1 P. Wms. 753; *Williams, Ex'rs*, 404, 406.

<sup>8</sup> Ante, p. 162, c. 10; *Porter v. Trall*, 30 N. J. Eq. 106.

<sup>9</sup> *Flagler v. Blunt*, 32 N. J. Eq. 518. Cf. ante, p. 143, c. 9.

An executor or administrator may therefore sue to recover all debts due to the deceased, whether debts of record, judgments, debts on bonds, covenants, or sealed instruments, promissory notes, or simple contracts, expressed or implied.<sup>10</sup> But, if the executor or administrator himself owe debts to the estate, he cannot enforce these claims by actions against himself. The manner of treating these debts has been discussed in a previous chapter.<sup>11</sup> Even if a contract was broken in the life of the testator or intestate, the cause of action still inures to the executor or administrator; the courts holding that the rule "*Actio personalis cum persona moritur*" applies only to actions founded upon tort, and not to those founded on contract.<sup>12</sup> But an exception to this rule existed where the injury arising out of a breach of contract, expressed or implied, to the deceased, consisted wholly of suffering to the deceased in person, and not to his personal estate. Thus, an action for breach of promise of marriage has been held not to survive, unless special damages to the personal estate of the deceased can be alleged.<sup>13</sup> Whenever the cause of action does not survive, the administrator of the deceased plaintiff may move to dismiss the action.<sup>14</sup> The termination by death of contracts which call for personal services only is discussed later.<sup>15</sup>

#### SAME—TORTS—REPLEVIN AND DETINUE.

**188. At common law, actions founded on a tort or injury done to the person or property of the deceased, and for which damages were recoverable, died with the person injured, or with the tortfeasor, and did not survive to the executor or administrator.**

<sup>10</sup> *Wheatley v. Lane*, 1 Saund. 216a, note 1; *Sleeper v. Insurance Co.*, 65 Me. 394; *Went. Off. Ex'r*, 159; *Toll. Ex'rs*, 157; *Irwin v. Hamilton*, 6 Serg. & R. (Pa.) 208.

<sup>11</sup> *Leland v. Felton*, 1 Allen (Mass.) 531; *Tarbell v. Jewett*, 129 Mass. 460. See ante, p. 242, c. 14.

<sup>12</sup> *Com. Dig. "Administration," B*, 13.

<sup>13</sup> *Chamberlain v. Williamson*, 2 Maule & S. 408.

<sup>14</sup> *Nettleton v. Dinehart*, 5 Cush. (Mass.) 543.

<sup>15</sup> *Post*, c. 23.

189. But by the statute of 4 Edw. III. an action was given to the executor, and by construction extended to an administrator, for trespass de bonis asportatis.
190. This statute was extended by equitable construction till either might have the same actions as the deceased himself might have had for any injury to the personal estate of the deceased during his life, whereby it was made of less value to the executor or administrator.
191. Detinue and replevin survive to the executor or administrator, under the same construction.

This equitable construction included, among other actions, trespass and trover;<sup>16</sup> also actions against a sheriff for the escape of a debtor, during the creditor's lifetime, held by him.<sup>17</sup> And so it has been held under the same statute that an action survives to the administrator for the failure of a sheriff's deputy to return an execution,<sup>18</sup> and an action of trover survives to the executor of a deputy sheriff for the conversion of property held by him under attachment.<sup>19</sup> So it has been held that actions of replevin and of detinue survive to the executor, under the equity of the statutes of 4 Edw. III and 31 Edw. III.<sup>20</sup> And the same decision has been made in Pennsylvania.<sup>21</sup> So of an action for conspiring to defraud a creditor.<sup>22</sup>

The statute of Edw. III., above referred to, did not extend to injuries done to the person of the deceased, or to his real property. Therefore actions of assault and battery, false imprisonment, slander, deceit, or for obstructing lights, etc., at common law, died with the person injured.<sup>23</sup>

<sup>16</sup> *Russell's Case*, 5 Coke, 27a; *Rutland v. Rutland*, Cro. Eliz. 377.

<sup>17</sup> *Platt's Case*, Plowd. 35.

<sup>18</sup> *Paine v. Ulmer*, 7 Mass. 317.

<sup>19</sup> *Badlam v. Tucker*, 1 Pick. (Mass.) 389.

<sup>20</sup> 4 Edw. III. c. 7; 31 Edw. III. c. 11; *Pitts v. Hale*, 3 Mass. 321; *Le Mason v. Dixon*, W. Jones, 173, 174; *Potter v. Van Vranken*, 36 N. Y. 626.

<sup>21</sup> *Reist v. Heilbrenner*, 11 Serg. & R. (Pa.) 131.

<sup>22</sup> *Penrod v. Morrison*, 2 Pen. & W. (Pa.) 126.

<sup>23</sup> *Wheatley v. Lane*, 1 Saund. 217, note 1.

## SAME—STATUTES IN THE UNITED STATES.

192. In the United States, statutes have been enacted in most states which provide that, in addition to the actions which survived at common law, there also survive actions of replevin, trover, and tort for damage to the person, or for damage done to real or personal estate. In some states, injuries to the person are not included in the statutes, and do not survive.

Although the statutes are not wholly uniform on the lines above pointed out, yet it may be considered as settled that actions for any damage to the personal estate, whereby its value is diminished to the owner, survive, by virtue of statutes, in all states. These actions include trover, for conversion,<sup>24</sup> replevin and detinue,<sup>25</sup> trespass, and trespass on the case.<sup>26</sup> In most states, also, actions for damages to the real estate before the death of the deceased survive to the executor or administrator by statute.<sup>27</sup> As to actions for damages to the person, the rule is not so uniform. In many states actions for all injuries to the person survive to the executor or administrator of the injured party,<sup>28</sup> while in others the rule of the common law is preserved, and actions for injuries to the person do not survive.<sup>29</sup> Actions which do not involve any

<sup>24</sup> *White v. Allen*, 133 Mass. 423. But not without the statute. *Terhune v. Bray's Ex'rs*, 16 N. J. Law, 54; *Cherry v. Hardin*, 4 Heisk. (Tenn.) 200.

<sup>25</sup> *Potter v. Van Vranken*, 36 N. Y. 626; *Pitts v. Hale*, 3 Mass. 321; *McCrory v. Hamilton*, 39 Ill. App. 490; *O'Neill v. Murry*, 50 N. W. 619, 6 Dak. 107.

<sup>26</sup> *Aldrich v. Howard*, 8 R. I. 125; *Snider v. Croy*, 2 Johns. (N. Y.) 227.

<sup>27</sup> *Musick v. Railway Co.*, 21 S. W. 491, 114 Mo. 309; *Halleck v. Mixer*, 16 Cal. 574, 579; *Webster v. City of Lowell*, 29 N. E. 543, 139 Mass. 172; *Ten Eyck v. Runk*, 31 N. J. Law, 428, 432; *Schee v. Wiseman*, 79 Ind. 389.

<sup>28</sup> *Vicksburg & M. R. Co. v. Phillips*, 2 South. 537, 64 Miss. 693; *Ward v. Blackwood*, 41 Ark. 295, 298; *Chicago & E. I. R. Co. v. O'Connor*, 9 N. E. 263, 119 Ill. 586; *Kellow v. Railway Co.*, 23 N. W. 740, 27 N. W. 466, and 68 Iowa, 470, 481; *McKinlay v. McGregor*, 10 Iowa, 111; *Hooper v. Inhabitants of Gorham*, 45 Me. 209; *Demond v. City of Boston*, 7 Gray (Mass.) 544; *Kimbrough v. Mitchell*, 1 Head (Tenn.) 539; *Hiner v. City of Fond du Lac*, 36 N. W. 632, 71 Wis. 74, 82.

<sup>29</sup> *Ott v. Kaufman*, 11 Atl. 580, 68 Md. 56; *Feary v. Hamilton*, 39 N. E. 516,

direct damage to person or property, but in which, by verbal representations, the injury complained of is done indirectly either to person or property, are generally held not to survive under such statutes. Thus, it has been held that an action of tort, for fraud and deceit in selling to the deceased a lot of damaged and poisoned corn, whereby his horses were killed, does not survive, since the gist of that action is the fraud and deceit, and not the injury to the horses, and the statute means that only actions in which the injury to personal property is the gist of the action survive.<sup>30</sup> But an action of trover, for the conversion of the goods of the deceased, survives expressly by the statute.<sup>31</sup> But an action for an imposition by means of false and fraudulent representations, whereby the deceased was induced to transfer property to one who defrauded her of its value, does not survive, under this statute; for here the gist of the action is the false representations, and the resulting injury to the property is only a consequence.<sup>32</sup> An action of replevin survives under these statutes.<sup>33</sup> The words "damage to the person" do not include actions which affect only the feelings of the person, such as breach of promise, slander, or malicious prosecution.<sup>34</sup> They refer only to damages of a physical character.<sup>35</sup> Penal actions abate by the death of either party, unless by statutory authority.<sup>36</sup> In some states actions of tort

140 Ind. 45; *Anderson v. Arnold's Ex'r*, 79 Ky. 370; *Jacksonville St. Ry. Co. v. Chappell*, 1 South. 10, 22 Fla. 616; *Baltimore & O. R. Co. v. Ritchie*, 31 Md. 191, 198; *Stanley v. Vogel*, 9 Mo. App. 98; *Victory v. Krauss*, 41 Hun (N. Y.) 533; *Miller v. Umbehower*, 10 Serg. & R. (Pa.) 31. See *Winnegar's Adm'r v. Railway Co.*, 4 S. W. 237, 85 Ky. 547.

<sup>30</sup> *Cutting v. Tower*, 14 Gray (Mass.) 183. But see *Tichenor v. Hayes*, 41 N. J. Law, 193.

<sup>31</sup> *White v. Allen*, 133 Mass. 423. But not without the statute. *Terhune v. Bray's Ex'rs*, 16 N. J. Law, 54; *Cherry v. Hardin*, 4 Heisk. (Tenn.) 200.

<sup>32</sup> *Leggate v. Moulton*, 115 Mass. 552. But see *Hadcock v. Osmer*, 38 N. Y. Supp. 618, 4 App. Div. 435.

<sup>33</sup> *McCrory v. Hamilton*, 39 Ill. App. 490; *O'Neill v. Murry*, 50 N. W. 619, 6 Dak. 107.

<sup>34</sup> *Norton v. Sewall*, 106 Mass. 145; *Smith v. Sherman*, 4 Cush. (Mass.) 408; *Nettleton v. Dinehart*, 5 Cush. (Mass.) 543. See *Tiff. Death Wrongf. Act*.

<sup>35</sup> *Smith v. Sherman*, 4 Cush. (Mass.) 413.

<sup>36</sup> *Carr v. Rischer*, 23 N. E. 296, 119 N. Y. 117.

survive only after a verdict by a jury.<sup>37</sup> An action for negligent injuries by the malpractice of a physician survives.<sup>38</sup> And so, an action for injuries under the civil damage acts.<sup>39</sup> An action for injuries received from bad repair of highway abates by death of plaintiff in some jurisdictions.<sup>40</sup> An action of libel dies with the plaintiff,<sup>41</sup> unless verdict has been rendered.<sup>42</sup> An action for unjust discrimination in freight rates does not abate by the death of the shipper.<sup>43</sup> An action against an officer of a corporation for making a false return as to the financial status of the corporation dies with the plaintiff.<sup>44</sup> An action for damages for property stolen, given by a statute in cases of larceny, rendering the defendant liable for double the value stolen, is an action for damages to the personal estate, and survives.<sup>45</sup>

In addition to the general statutes regulating this subject, it is sometimes the case that statutes creating causes of action have express provisions that the executor or administrator may prosecute them after the death of the testator or intestate. Thus, when an action is given by statute to enable a landowner whose land is flowed by mills below to recover damages for such flowage, it is generally provided that the executor or administrator may prosecute the action; and it is held that such executor or administrator may recover damages for injuries both before and after the death of the landowner, although the damages occurring after the death of the landowner will be held in trust for the heirs, to whom the title to the land descends after the death of the first owner.<sup>46</sup> So if land of the deceased was taken during his life for public purposes, by right of eminent domain, and his title to it divested, the claim

<sup>37</sup> *Cooper v. Railway Co.*, 56 N. W. 588, 55 Minn. 134. As to actions of libel, see *Swift Specific Co. v. Davis*, 76 Ga. 787.

<sup>38</sup> *Norris v. Grove*, 58 N. W. 1006, 100 Mich. 256.

<sup>39</sup> *Morenus v. Crawford*, 5 N. Y. Supp. 453, 51 Hun, 89.

<sup>40</sup> *Topping v. Town of St. Lawrence*, 57 N. W. 365, 86 Wis. 526.

<sup>41</sup> *Jones v. Townsend*, 2 South. 612, 23 Fla. 355.

<sup>42</sup> *Wood v. Boyle*, 17 Pa. Co. Ct. R. 325.

<sup>43</sup> *Tucker v. Railroad Co.*, 27 Atl. 448, 18 R. I. 322.

<sup>44</sup> *Brackett v. Griswold*, 9 N. E. 438, 103 N. Y. 425.

<sup>45</sup> *Aylsworth v. Curtis* (R. I.) 34 Atl. 1109.

<sup>46</sup> *Darling v. Manufacturing Co.*, 16 Gray (Mass.) 189.

for damages belongs to the administrator, and not to the heirs;<sup>47</sup> but if such taking was after his decease, the damages belong to the heirs.<sup>48</sup> In the absence of statutory authority, the cause of action in special proceedings does not survive.<sup>49</sup>

### SAME—DEATH BY WRONGFUL ACT

#### 193. In some states by statute a right of action is given for wrongfully causing the death of the deceased.

A large class of actions of tort consists of cases where the deceased was killed by the negligence of another person or a corporation. At common law no action existed in favor of an executor or administrator on account of the negligent killing of the deceased, but in the United States statutes often provide that the executor or administrator shall have a right of action, and this right of action is sometimes made assets belonging to the estate of the deceased.<sup>50</sup> In many cases, however, the right of action is given to the next of kin, or widow, or is given to the executor merely nominally, and with specific directions that the amount received shall be distributed in a certain way, in which case the right of action is not part of the estate of the deceased.

<sup>47</sup> *Moore v. City of Boston*, 8 Cush. (Mass.) 277; *Neal v. Railroad Co.*, 61 Me. 298.

<sup>48</sup> *Neal v. Railroad Co.*, 61 Me. 298.

<sup>49</sup> *In re Palmer*, 22 N. E. 221, 115 N. Y. 493; *In re Roberts*, 6 N. Y. Supp. 195, 53 Hun, 338; *In re Barney*, 6 N. Y. Supp. 401, 53 Hun, 480; *Davis v. State*, 22 N. E. 9, 119 Ind. 555.

<sup>50</sup> *Kelley v. Railroad Co.*, 135 Mass. 448; *Birch v. Railway Co.*, 30 Atl. 826, 165 Pa. St. 339; *Nixon v. Ludlam*, 50 Ill. App. 273; *Atchison, T. & S. F. R. Co. v. Napole*, 40 Pac. 669, 55 Kan. 401; *Memphis & C. Packet Co. v. Pikey*, 40 N. E. 527, 142 Ind. 304; *Lubrano v. Atlantic Mills (R. I.)* 32 Atl. 205; *Chicago & E. R. Co. v. Branyan*, 37 N. E. 190, 10 Ind. App. 570; *Tennessee Coal, Iron & R. Co. v. Herndon*, 14 South. 287, 100 Ala. 451; *Hackett v. Railroad Co.*, 24 S. W. 871, 95 Ky. 236; *McClure v. Alexander (Ky.)* 24 S. W. 619. But where a statute giving a civil remedy is enacted, there being already a statute giving a criminal action, and the latter does not abrogate the former, a cause of action accruing prior to the passage of the later act cannot sustain an action under it. *Kelley v. Railroad Co.*, *supra*. A full and accurate statement of the law on this topic may be found in *Tiff. Death Wrongf. Act*.

Under statutes by which an action for negligence whereby a person is injured so that he dies is given to the injured person, the action is held to survive under statutes allowing survival of actions for injuries to the person, without express words to that effect in the statute, if the person killed lives after the accident; for such a cause of action is for injury to him, and not for killing him, and therefore, being an existing right of action of tort, accrued to the injured person in his life, it survives to his executor or administrator under the statute.<sup>51</sup> Even 15 minutes' life after the accident has been held enough to transfer this right to the executor or administrator, though insensibility intervenes immediately upon the accident;<sup>52</sup> but such unconsciousness would deprive the executor or administrator of all right to recover for mental suffering.<sup>53</sup>

If, however, death is instantaneous, no action survives, unless by statute,<sup>54</sup> and the burden of proving that the death is not instantaneous is on the plaintiff.<sup>55</sup> But if the proof shows that there were motions and sounds made by the injured person after the accident, though there may be conflict of testimony as to whether these motions and sounds indicated life, or whether they merely indicated spasmodic muscular contractions accompanying a violent death, and how far they may have been caused by moving the body, there is sufficient testimony to submit to the jury upon the question whether the deceased actually lived after the accident.<sup>56</sup> This species of action is an action of tort "for damage to the person," under the statute.<sup>57</sup>

<sup>51</sup> *Hollenbeck v. Railroad Co.*, 9 Cush. (Mass.) 479; *Bancroft v. Railroad Co.*, 11 Allen (Mass.) 35; *Newport News & M. V. R. Co. v. Dentzel's Adm'r*, 14 S. W. 958, 91 Ky. 42. Contra, *Davis v. Railroad Co.*, 9 N. E. 815, 143 Mass. 304.

<sup>52</sup> *Hollenbeck v. Railroad Co.*, 9 Cush. (Mass.) 479; *Bancroft v. Railroad Co.*, 11 Allen (Mass.) 35. See, for a full discussion, *Tiff. Death Wrongf. Act*.

<sup>53</sup> *Kennedy v. Sugar Refinery*, 125 Mass. 90; *Clark v. Railroad Co.*, 35 N. E. 104, 160 Mass. 39.

<sup>54</sup> *Moran v. Hollings*, 125 Mass. 93; *Kearney v. Railroad Corp.*, 9 Cush. (Mass.) 109.

<sup>55</sup> *Corcoran v. Railroad Co.*, 133 Mass. 507; *Riley v. Railroad Co.*, 135 Mass. 292.

<sup>56</sup> *Tully v. Railroad Co.*, 134 Mass. 500. But see *Kearney v. Railroad Corp.*, 9 Cush. (Mass.) 112.

<sup>57</sup> *Norton v. Sewall*, 106 Mass. 143.



*The Right of Action in Different States.*

The administrator or executor cannot recover in one state upon such a statutory action given by the statute of another state, where the injury was done, if the statutory action so given does not confer a right of property, but gives merely a specific power to the executor or administrator to sue for the benefit of the relatives; for instance, where it does not give damages for the injury to the deceased, but gives a right to recover a certain amount, in the nature of a penalty, for the estimated pecuniary damages to the widow and children resulting from the death of an injured person. And this amount is not to be distributed, as other assets of the estate are, in payment of his debts, or subject to his will, but only in respect to the distributees and shares to be taken;<sup>58</sup> or, in other words, if the statute of one state creates a right of property, this right will be enforced in another state, but a penal statute will not. If no statute exists in the state where the killing was done, no action can be had in another state, where such a statute exists;<sup>59</sup> but if such a statute exists in the state where the killing was done, and gives an action which is a right of property, this right will be enforced in the state of the killing, at suit of a foreign administrator, if he is duly authorized to sue,<sup>60</sup> and will be enforced in another state where there is a similar statute,<sup>61</sup> and even in a state where there is no such statute.<sup>62</sup> The courts of one state will not enforce a statutory right of action for negligent killing, given by a statute of another state where the cause of action accrued, if the statute is penal in its nature, with a limit to the sum recoverable, and containing a special direction as to the distribution of the sum recovered,—the sum therefore not being assets of estate,—although the action is to be maintained by the executor or administrator.<sup>63</sup>

<sup>58</sup> Needham v. Railway Co., 38 Vt. 294; State v. Pittsburgh & C. R. Co., 45 Md. 41; Morris v. Railway Co., 23 N. W. 143. 65 Iowa, 730; Richardson v. Railroad Co., 98 Mass. 85. See Dennick v. Railroad Co., 103 U. S. 11. And compare, on right to sue in states other than that of appointment, ante, p. 162, c. 10.

<sup>59</sup> Willis v. Railway Co., 61 Tex. 432; Whitford v. Railroad Co., 23 N. Y. 465.

<sup>60</sup> Memphis & Cincinnati Packet Co. v. Pikey, 40 N. E. 527, 142 Ind. 304; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48.

<sup>61</sup> Burns v. Railroad Co., 15 N. E. 230, 113 Ind. 169.

<sup>62</sup> Herrick v. Railway Co., 16 N. W. 413, 31 Minn. 11.

<sup>63</sup> Davis v. Railroad Co., 9 N. E. 815, 143 Mass. 303.

## SAME—AFTER ACCRUING RIGHTS.

**194. An executor or administrator may sue upon causes of action accruing to the estate after the death of the deceased.**

The executor or administrator may have certain rights of action accrue to the estate after the death of the testator or intestate. Thus, if any property belonging to the deceased is, after the death of the owner, taken away or injured by a third person, the executor or administrator may sue for this injury in the proper form of action, and may do this either in his individual capacity, or as executor or administrator, as the case may be; for the goods are supposed to be in his possession, although he may not have ever had the actual possession of them.<sup>64</sup> So an executor may make contracts with regard to the estate, and may then sue upon them, either in his individual or in his representative capacity; and that whether the consideration of the contract was something done or to be done by the deceased, or by himself as executor.<sup>65</sup> Thus, when an administrator of one who was indorser on a promissory note was obliged to pay the note, it was held that he might sue in his own name to recover the sum thus paid, and when he recovered the amount it was assets in his hands.<sup>66</sup>

Again, contracts of the deceased may not be broken by the other party to the contract until after the death of the contractor; and, though no cause of action accrues to the estate till such breach, the executor or administrator may sue upon it.<sup>67</sup> And the same is true where, by means of a condition broken after the death of the testator or intestate, a chattel reverts to his estate. So, when a chattel is pledged, the executor or administrator of the pledgor may redeem at the appointed time,<sup>68</sup> or if injury is done to the

<sup>64</sup> *Bollard v. Spencer*, 7 Term R. 358; *Hollis v. Smith*, 10 East, 294; *Grimstead v. Shirley*, 2 Taunt. 117. As to such actions before appointment, see ante, p. 247,

<sup>65</sup> *Needham v. Croke*, Freem. 538; *Cowell v. Watts*, 6 East, 405; *Webster v. Spencer*, 3 Barn. & Ald. 365; *Foxwist v. Tremaine*, 2 Saund. 208.

<sup>66</sup> *Mowry v. Adams*, 14 Mass. 327.

<sup>67</sup> *Chapman v. Dalton*, Plowd. 286.

<sup>68</sup> Went. Off. Ex'r, 181. See, as to his duty-so to redeem, ante, p. 257, c. 15.

personal property, after the death of the owner, the executor or administrator may maintain an action therefor.<sup>69</sup>

The rights of an executor or administrator as to suits in the interim between the death of the deceased and the appointment of the executor or administrator were examined at the beginning of this chapter.

#### SAME—ACTIONS BEGUN BEFORE DEATH.

**195. The right of an executor or administrator to prosecute actions begun by the decedent depends on statutory authorization. It exists in most cases where the executor or administrator could begin the action *de novo*.**

If there are several plaintiffs or defendants, and one die, the suit is carried on by the survivors, unless by statute the executor or administrator of the deceased is admitted to prosecute or defend with the survivors;<sup>70</sup> if all die, by the executor or administrator of the last survivor.<sup>71</sup> If the suit is by husband and wife in her right, and she dies, and the husband is appointed administrator, he may prosecute the suit.<sup>72</sup> As the right of an executor or administrator to come in and prosecute an action depends wholly on statute, it must be confined to the cases covered by the statute, and does not extend to cases not included therein, as, e. g. actions for liens, or other extraordinary remedies, unless it is so expressly enacted.<sup>73</sup> And, if the cause of action does not survive, the executor or administrator cannot come in to prosecute. The rule in this regard is laid down by Shaw, C. J., as follows: "As a general test, an executor or administrator cannot come in and prosecute a suit unless he was in a condition to commence a like suit if it had not been begun by his testator or intestate. And it

<sup>69</sup> *Hutchins v. Adams*, 3 Greenl. (Me.) 174. Cf. *supra*, note 64.

<sup>70</sup> *Treat v. Dwinel*, 59 Me. 341; *Hess v. Lowrey*, 23 N. E. 156, 122 Ind. 225; *Henning v. Farnsworth* (W. Va.) 23 S. E. 663.

<sup>71</sup> *Id.*

<sup>72</sup> *Pattee v. Harrington*, 11 Pick. (Mass.) 221.

<sup>73</sup> *Richards v. Richards*, 136 Mass. 126; *Fales v. Stone*, 9 Metc. (Mass.) 316.

seems quite clear that he cannot so come in and prosecute unless he is entitled, in his representative character, to have the fruits of the suit; that is, to have judgment qua executor for the subject-matter of it."<sup>74</sup> An executor appointed in one state cannot continue an action in another without taking letters in the latter state.<sup>75</sup>

There are generally provisions of statutes by which an administrator de bonis non may take up any suit begun by a former incumbent of the office. Without such a statute, it has been held that there is no such privity between a former and a succeeding administrator as would allow such substitution.<sup>76</sup> If a woman who is unmarried and executrix or administratrix brings suit, and then marries, and her husband becomes joined in the office with her, and she dies, and he is appointed administrator de bonis non, he may, under a statute allowing a succeeding administrator to prosecute judgments, prosecute the action brought by her.<sup>77</sup> An administrator de bonis non appointed in another state cannot carry on the suit of a deceased executor or administrator.<sup>78</sup>

#### SUITS—WHEN IN PERSONAL AND WHEN IN REPRESENTATIVE CAPACITY.

196. For every cause of action which arose during the lifetime of the testator or intestate, the action must be brought in the official capacity, "as executor" or "as administrator." If the cause of action arose after the death of the testator or intestate, the executor or administrator has his choice of bringing suits either in his official capacity or in his own right.

<sup>74</sup> *Ferrin v. Kenney*, 10 Metc. (Mass.) 295.

<sup>75</sup> *Kropff v. Poth*, 19 Fed. 200. On the subject of suing in a state other than that of appointment, see ante, p. 162, c. 10.

<sup>76</sup> *Brown v. Pendergast*, 7 Allen (Mass.) 427.

<sup>77</sup> *Brown v. Pendergast*, 7 Allen (Mass.) 427.

<sup>78</sup> *Isbell v. Blanchard*, 21 S. E. 720, 94 Ga. 678. Cf., as to rights to sue outside the state of appointment, ante, p. 162, c. 10.

The suits which are brought by an executor or administrator on causes of action which accrued during the life of the deceased are to be brought by the executor or administrator in his representative capacity, because he has no personal right of action, but only a transmitted right, coming to him as representative of the deceased; but, when the cause of action accrued after the death of the deceased, the executor or administrator may bring suit either personally, or in his representative capacity, if the cause of action relates to the property of the estate.<sup>79</sup> Unless by statutory authority, he cannot join in the same action counts in his official capacity and in his own right;<sup>80</sup> but he can join counts on promises to the deceased with counts on promises to himself "as executor" or "as administrator."<sup>81</sup>

As a general rule, when there are several executors or administrators who have qualified for the office, all must join in actions brought by them either at law or in equity.<sup>82</sup> But, if they do not, this defect can only be taken advantage of by the plea in abatement. If the defendant plead the general issue, or other plea to the merits, he waives the nonjoinder.<sup>83</sup> This rule that all must sue is subject to some qualification; for if one of several makes a contract regarding the estate, or sells part of it, he alone can sue on the contract, or for the price;<sup>84</sup> or, if goods are taken from the possession of one, he alone may sue for the tort.<sup>85</sup> In such case

<sup>79</sup> Williams, Ex'rs, 1871; Kline v. Guthart, 2 Pen. & W. 491, 492, per Gilson, C. J.; Carlisle v. Burley, 3 Greenl. (Me.) 250; Mowry v. Adams, 14 Mass. 327; Williams v. Moore, 9 Pick. (Mass.) 432; Bates v. Bates, 134 Mass. 110; Plimpton v. Goodell, 126 Mass. 119; Stanley v. Gaylord, 10 Metc. (Mass.) 82; Stewart v. Richey, 17 N. J. Law, 164.

<sup>80</sup> Brown v. Webber, 6 Cush. (Mass.) 560; Mason v. Norcross, 1 N. J. Law, 242.

<sup>81</sup> Williams, Ex'rs, 1872, 1873.

<sup>82</sup> Smith's Ex'rs v. Chapman's Ex'r, 5 Conn. 27; Judson v. Gibbons, 5 Wend. (N. Y.) 224; Rinehart's Ex'rs v. Rinehart, 15 N. J. Eq. 44; Hunt v. Kearney, 3 N. J. Law, 721; In re Coursen, 4 N. J. Eq. 408.

<sup>83</sup> Tuckey v. Hawkins, 4 C. B. 655; Packer v. Willson, 15 Wend. (N. Y.) 343; Bodle v. Hulse, 5 Wend. (N. Y.) 313; Cole v. Smalley, 25 N. J. Law, 374.

<sup>84</sup> Heath v. Chilton, 12 Mees. & W. 632; Williams, Ex'rs, 1868, 1869. Cf., as to joint executors and administrators, ante, p. 174, c. 11.

<sup>85</sup> Godol. pt. 2, c. 16, § 1; Went. Off. Ex'r, 224.

he must sue in his own right, for, if he sued as executor or administrator, the defendant, by plea in abatement, might require the joinder of all the executors or administrators, and so defeat the action.<sup>86</sup> If the deceased was a member of a partnership, or one of several joint contractors, the executor has no right, as above stated, unless by statute, to join in an action on a debt due to the partnership, or on the contract, for the action survives to the others;<sup>87</sup> and if all die, the executor or administrator of the last survivor alone can sue, unless by statutory authority.<sup>88</sup> If, on a covenant, the interests are several, the executor or administrator of one may sue separately.<sup>89</sup> The same rules apply to actions of tort, where several owned the property injured, at the time of the injury.<sup>90</sup> If a married woman dies, and the cause of action does not go to her husband, her administrator has a right to prosecute it.<sup>91</sup>

According to modern practice, it is not generally necessary for either an executor or an administrator to make profert of his letters in his declaration, nor can the defendant have oyer of them.

<sup>86</sup> Williams, Ex'rs, *supra*.

<sup>87</sup> *Strang v. Hirst*, 61 Me. 9; *Clark v. Howe*, 23 Me. 560; *Tillotson v. Tillotson*, 34 Conn. 335; *Merritt v. Dickey*, 38 Mich. 41; *Daby v. Ericsson*, 45 N. Y. 790; *Nehrboss v. Bliss*, 88 N. Y. 604; *Holbrook v. Lackey*, 13 Metc. (Mass.) 134. If there are several surviving partners, all must join. *Peters v. Davis*, 7 Mass. 257. Even if, on accounting, nothing would be due to the surviving partner, still he alone should sue for a partnership debt. *Daby v. Ericsson*, *supra*. If a contract for the purchase of land was made to three, who bring suit to enforce it, and one dies, the others may continue the suit, and hold the share of the deceased third, when recovered, in trust for his executors or administrators. *Webster v. Kings County Trust Co.*, 39 N. E. 964, 145 N. Y. 275.

<sup>88</sup> Williams, Ex'rs, 1865, 1866; *Martin v. Crump*, 2 Salk. 444; *Anderson v. Martindale*, 1 East, 498; *Walker v. Maxwell*, 1 Mass. 104; *Smith v. Franklin*, Id. 480; *Nehrboss v. Bliss*, 88 N. Y. 604. He may even join a debt due to him individually. *Hancock v. Haywood*, 3 Term R. 433; *Adams v. Hackett*, 27 N. H. 289; *Nehrboss v. Bliss*, *supra*. And the defendant may set off a debt due by the surviving partner individually. *Holbrook v. Lackey*, 13 Metc. (Mass.) 134; *Nehrboss v. Bliss*, *supra*.

<sup>89</sup> Williams, Ex'rs, 1866, 1867.

<sup>90</sup> Williams, Ex'rs, 1867.

<sup>91</sup> *Allen v. Wilkins*, 3 Allen (Mass.) 321; *Noice v. Brown*, 39 N. J. Law, 569; *Sleeper v. Insurance Co.*, 65 Me. 396.

It is sufficient if the plaintiff be ready at the trial with them as evidence.<sup>92</sup>

The grant of letters is conclusive proof of the representative character of the plaintiff. The principles which govern the investigation into the title of the executor or administrator to his office have been already discussed at length, in treating of the conclusiveness of the decrees of the probate court, and it will be sufficient here to refer the reader to that chapter.<sup>93</sup> The allegation of the plaintiff being executor or administrator can only be met by a plea in abatement. If the general issue is pleaded, the character of the plaintiff is admitted.<sup>94</sup>

### PROCEEDINGS IN EQUITY.

**196a. The remedies in equity which are available to the executor or administrator may be divided into three classes:**

- (a) Suits in equity begun by deceased.
- (b) Suits begun by the executor or administrator on causes of action which existed at the death of deceased, or accrued as part of the estate afterwards.
- (c) Suits which the executor or administrator uses incidentally to the administration of the estate.

As to the first, it may be observed that the practice in equity, where a suit abates because a complainant dies pending the suit, is for the action to be continued by the executor or administrator, by a bill of revivor, or by an order of the same nature,<sup>95</sup> or by a substitution of the executor or administrator as complainant, under statutory authority similar to the proceedings at common law, which have been already stated. As to the second class,—that is, equitable rights which accrued during the deceased's life, or

<sup>92</sup> Williams, Ex'rs, 1875; Langdon v. Potter, 11 Mass. 314. And see the statutes of the various states.

<sup>93</sup> Ante, p. 19, c. 2; Clark v. Pishon, 31 Me. 503.

<sup>94</sup> Clark v. Pishon, 31 Me. 503; M'Kimm v. Riddle, 2 Dall. 100. In most states, by statute, the appointment is admitted, unless expressly denied.

<sup>95</sup> Williams, Ex'rs, 890.

afterwards, forming part of the assets of the estate,—the executor or administrator succeeds to them, and may enforce them by the same equitable remedies as the deceased might have had.<sup>96</sup> Thus, a bill in equity to enforce a vendor's lien should be brought by the administrator.<sup>97</sup> And an executor or administrator has all the rights, in winding up a partnership, that the deceased would have had, to call for an account and settlement,<sup>98</sup> or to restrain the use of a trade-mark or firm name,<sup>99</sup> or to foreclose or redeem a mortgage.<sup>100</sup> The third class—that is, equitable remedies incident to settling the estate—includes all the various equitable remedies which may be proper for enforcing the rights of property, and the discussion of these remedies is properly to be sought in treatises on Equity.

#### SUIT FOR PARTNERSHIP ACCOUNTING.

**196b. The executor or administrator of a deceased partner may maintain a bill in equity for an accounting and settlement of the partnership affairs.**

Partners, on account of their peculiar relationship, cannot sue each other at law for demands based upon partnership dealings during the existence of the partnership. Their only remedy is a bill in equity, in which all the demands and accounts of the partnership are brought together and settled, and the balance of assets or liabilities apportioned between the two partners.<sup>101</sup> This rule, which applies to all cases of settling the affairs of the partnership whenever it is dissolved, applies equally to the case when the partnership is dissolved by the death of one of the partners; and the

<sup>96</sup> *Phillips v. Allen*, 5 Allen (Mass.) 85.

<sup>97</sup> *Hubbard v. Clark*, 3 Stew. N. J. Dig. Supp. p. 241.

<sup>98</sup> *Freeman v. Freeman*, 136 Mass. 260; *Schenkl v. Dana*, 118 Mass. 236; *Shearer v. Shearer*, 98 Mass. 107.

<sup>99</sup> *Sohier v. Johnson*, 111 Mass. 238; *Morse v. Hall*, 109 Mass. 409; *Bowman v. Floyd*, 3 Allen (Mass.) 76.

<sup>100</sup> *Ante*, c. 14.

<sup>101</sup> *Capen v. Barrows*, 1 Gray (Mass.) 381; *Rockwell v. Wilder*, 4 Metc. (Mass.) 556; *McFadden v. Hunt*, 5 Watts & S. (Pa.) 468; See Abb. Desc., Wills & Adm. § 6.



mode in which the representatives of the estate of the deceased partner obtain a settlement of their accounts is by a bill in equity, in which it is prayed that the partnership affairs be wound up, and that there be an accounting, and payment to the plaintiffs of whatever may be due to the estate.<sup>102</sup> This accounting involves two sets of accounts—First, accounts of the partnership with strangers; and, second, the accounts between the surviving partners and the estate of the deceased partner. All the partnership debts must be paid before anything is due to the estate, and therefore, in such proceedings, a creditor may intervene and obtain the payment of his debt.<sup>103</sup> If, however, the debts of the partnership are all paid, and there is nothing left but division of the assets, and these assets are real estate, which can be divided up between the surviving partner and the heirs of the deceased partner, a court of equity will not interfere, and order a sale of the land, in order to convert the real assets into money, but will leave the parties to divide up the land.<sup>104</sup>

The regular procedure for the division of partnership assets is for the surviving partner to collect the assets by enforcing the payment of the debts so far as possible, and then to ascertain the value of the assets, either by valuation or by sale, and to transfer the share belonging to the deceased partner to the representatives of his estate.<sup>105</sup> Ascertaining the value of the assets by a valuation, or by a private sale, is not a matter of right, but of agreement between the surviving partners and the representatives of the deceased partner. If they agree, they may value the deceased's share, or they may sell it to the surviving partners,<sup>106</sup> or to any other person, subject, of course, to answer for such proceedings to the next of kin, and others interested in the estate of the deceased, in settling their probate accounts. It is therefore prefer-

<sup>102</sup> *Schenkl v. Dana*, 118 Mass. 237; *Freeman v. Freeman*, 136 Mass. 264; *Knowlton v. Reed*, 38 Me. 246; *Woodward v. Cowing*, 41 Me. 9; *Buckingham v. Ludlum*, 37 N. J. Eq. 139.

<sup>103</sup> *Washburn v. Goodman*, 17 Pick. (Mass.) 528; *Buckingham v. Ludlum*, 37 N. J. Eq. 139.

<sup>104</sup> *Shearer v. Shearer*, 98 Mass. 115.

<sup>105</sup> *Lindl. Partn.* \*591, \*592; *Freeman v. Freeman*, 136 Mass. 263.

<sup>106</sup> *Freeman v. Freeman*, 136 Mass. 263.

able to have the assent of those interested in the estate to such agreements.<sup>107</sup> If the parties before referred to cannot agree to any such mode of ascertaining the value of the deceased partner's share, the only mode which either can insist upon, as a matter of right, is a suit to wind up the partnership, in which the procedure is to have the assets sold at a general sale, or by valuation by order of the court, and the proceeds distributed in the proportion in which the capital in the partnership is owned.<sup>108</sup>

If any of the assets are unsalable, they will be valued by the court in which the partnership is being wound up.<sup>109</sup> As a forced sale under order of the court is likely to be detrimental to the interests of all those who are concerned in the partnership affairs, the courts will always prefer to settle the partnership affairs upon some other basis; as, for instance, by valuation or sale to one of the partners.<sup>110</sup>

The surviving partners must account for all the profits which have been made in the business since the death of the deceased partner, as well as before and up to the time of closing the account; for his capital is still in the firm, and is entitled to its share of the profits.<sup>111</sup> The continuance of the business by a surviving partner any longer than is necessary to close out the business is, of course, without right, unless done by a special agreement to that effect in the partnership articles, or unless it is done by the executor, by direction of the will, or by agreement of those interested in the estate.<sup>112</sup> The questions which are raised by continuing the business are extremely complicated and difficult, particularly in regard to the liability of partners employing the capital of the deceased partner. Their primary liability is to make whole the capital, and to pay either the profits received by them,

<sup>107</sup> Lindl. Partn. \*592, \*593.

<sup>108</sup> Lindl. Partn. \*592, \*593; *Crawshay v. Collins*, 15 Ves. 226, 229; *Featherstonhaugh v. Fenwick*, 17 Ves. 308; *Freeman v. Freeman*, 136 Mass. 263; *Robinson v. Simmons*, 15 N. E. 558, 146 Mass. 175.

<sup>109</sup> Lindl. Partn. \*558; *Smith v. Mules*, 9 Hare, 572; *Ambler v. Bolton*, L. R. 14 Eq. 427.

<sup>110</sup> Lindl. Partn. \*556, \*591; *Leaf v. Coles*, 1 De Gex, M. & G. 171.

<sup>111</sup> Lindl. Partn. \*521; *Freeman v. Freeman*, 136 Mass. 264; *Robinson v. Simmons*, 15 N. E. 558, 146 Mass. 175.

<sup>112</sup> Lindl. Partn. \*590; *Robinson v. Simmons*, 15 N. E. 558, 146 Mass. 175.

or interest upon the capital. Which of these two it shall be seems to depend upon the option of the representatives of the deceased partner. If the business has been profitable, the estate of the deceased should be allowed the whole profits made by his share of the capital, less a deduction to compensate the partners who managed the business for their time and trouble in so doing.<sup>113</sup> If the business has been so unprofitable that the profits do not amount to simple interest on the capital, the representatives of the deceased partner's estate may claim simple interest upon the capital, or, in cases of fraud or breach of trust, compound interest.<sup>114</sup> If the executors or administrators themselves join in continuing the business, they render themselves liable in the same way as the surviving partners, with the additional factor against them that they have been guilty of a breach of trust, and are therefore more liable to be held for compound interest.<sup>115</sup>

*Same—Interest—Profits of Continued Business.*

When interest is charged against surviving partners, it should begin to run after a reasonable time has been allowed since the death of the deceased partner, in which they may collect the debts and settle the affairs of the firm. Interest should not ordinarily be charged immediately from the death of the deceased partner. In one case 18 months were allowed for the settlement of the affairs of the firm, and this was considered a proper allowance.<sup>116</sup> In computing the profits of a business carried on after a partner's decease, each case must stand on its own circumstances, as to the proportion of profits to be charged to capital, and to skill and time and labor of the surviving partners who conduct the business.<sup>117</sup> The general rule has been laid down that profits should be divided according to capital, after deducting the share of profits which is attributable to the skill and services of the surviving part-

<sup>113</sup> Lindl. Partn. \*527, \*528, \*529; Robinson v. Simmons, 15 N. E. 558, 146 Mass. 175.

<sup>114</sup> Lindl. Partn. \*531.

<sup>115</sup> Lindl. Partn. \*528, \*529, \*530.

<sup>116</sup> Washburn v. Goodman, 17 Pick. (Mass.) 526. Cf., as to interest, ante, p. 269, c. 15.

<sup>117</sup> Willett v. Blanford, 1 Hare, 253; Lindl. Partn. \*525, \*526; Robinson v. Simmons, 15 N. E. 558, 146 Mass. 176.

ner.<sup>118</sup> But in the same case it was held, on the special circumstances of the case, that, after the surviving partners had paid to the estate of the deceased the original capital and interest, they should be held to pay only interest at 7 per cent. upon the balance still due, consisting of surplus profits over the interest on the original capital, and should not be compelled to pay the whole profits accruing upon that balance.

In one case<sup>119</sup> the facts were that one partner died, and the other partner bought the partnership assets, at a valuation, from the representatives of the deceased, excepting a patent right, which had been owned by the partners, and under which they had manufactured. The surviving partner continued to manufacture under this patent, against the remonstrance and prohibition of the administratrix of the deceased partner, who finally brought a bill in equity for settling the affairs of the partnership, and for an accounting of the profits of the manufacture of the patented article. The court sustained the bill and ordered an accounting, saying: "The surviving partner is bound to wind up the partnership, and ordinarily to make a sale of all personal assets, and not only to pay the debts of the firm, but to distribute to the representatives of the deceased partner the share to which they are entitled. This duty of the surviving partner may not be strictly that of a trustee, but it is analogous; and he is not allowed to derive a distinct and independent personal advantage, either directly or indirectly, from the use of the partnership assets, but he must manage and dispose of them with a single eye to the advantage of the partnership estate which he is to administer. This rule is universal in its application to fiduciary relations. It extends also to the duty of a surviving partner, and he is bound to act in perfect fairness and good faith, according to the highest standard of honor, and with reasonable care and diligence with reference to the decedent's interests. That which was partnership property before the dissolution continues to be so afterwards, and a sale of the whole personal property will ordinarily be enforced by a court of equity, and an account ordered of profits made since the dissolu-

<sup>118</sup> Robinson v. Simmons, 15 N. E. 558, 146 Mass. 177.

<sup>119</sup> Freeman v. Freeman, 136 Mass. 200.

tion. The surviving partner is not allowed to divide this property in specie, or to take it himself at a valuation, or to have its value ascertained otherwise than by a sale; but he must turn all the assets into an available and distributable form, so far as this can be done." And it was held that the letters patent should be sold, and also that the defendant should account. The case was sent to a master to account before him, with instructions to find the amount of net income and profits from the manufacture and sale of the patented goods and the use of the letters patent, and, in taking the account, to make to the defendant all just allowance for money and labor expended in carrying on the manufacture and sale of said goods. The master reported in two forms: First, the net profits of the manufacture and sale of the patented goods, including both the manufacturer's and patentee's profits; and, secondly, the net income and profits derived from the use of the letters patent, or what he termed the "patentee's profits,"—and found that the administratrix was entitled to recover one-half of one of these sums,—whichever in the opinion of the court was deemed proper. The court held that the plaintiff was entitled only to the latter, or patentee's profits, and that the defendant was entitled not only to interest upon his capital, and a reasonable sum for his services, but also to a fair and reasonable profit from the business,—the so-called manufacturer's profit,—and this profit was found to be 20 per cent.<sup>120</sup>

*Same—Compensation of Labor and Skill.*

Ordinarily a surviving partner who closes up the business of the firm as soon as possible after the death of the deceased partner is not entitled to any compensation for so doing; but if the business is continued with a view of making the most profitable disposition of the assets, and this is done with the knowledge of the representatives of the deceased partner, the surviving partner may be entitled to compensation for his services in closing up the estate.<sup>121</sup>

<sup>120</sup> Freeman v. Freeman, 7 N. E. 710, 142 Mass. 98.

<sup>121</sup> Brown v. McFarland's Ex'r, 41 Pa. St. 129; Beatty v. Wray, 19 Pa. St. 516; Schenkl v. Dana, 118 Mass. 238; Robinson v. Simmons, 15 N. E. 558, 146 Mass. 174; Freeman v. Freeman, 7 N. E. 710, 142 Mass. 98.

## ACTIONS BY PERSONAL REPRESENTATIVES OF MORTGAGOR AND MORTGAGEE.

196c. The personal representatives of a deceased mortgagee may maintain actions relating thereto, but the personal representatives of a deceased mortgagor cannot bring a bill to redeem.

It has already been seen that a mortgagee's interest in a mortgage, until foreclosure, is a personal interest.<sup>122</sup> If, therefore, the mortgagee dies before foreclosure, an action to recover possession, or any action relating to the possession, e. g. trespass quare clausum, must be brought by his executor or administrator, and not by his heirs.<sup>123</sup> And this is true whether the action be against the mortgagor, or those claiming under him, or against a disseisor,<sup>124</sup> or against the heirs of the mortgagee, who have trespassed on the land.<sup>125</sup> So a bill to foreclose should be brought by the executor or administrator.<sup>126</sup> But, if one of several mortgagees die, the interest vests in the survivor, and he alone can sue on it; and, if it is paid to him, he holds half the money as his own, and half as trustee for the estate of the deceased mortgagor.<sup>127</sup> Conversely, the right of redemption of a mortgagor is considered real estate, vesting in his heirs; and they alone, and not the executor or administrator, can bring a bill to redeem the mortgage,<sup>128</sup> unless otherwise provided by statute.<sup>129</sup> Such a bill may, in some states, be brought by the widow, both on her title to dower, and as administratrix.<sup>130</sup>

<sup>122</sup> Ante, p. 212, c. 14; *Look v. Kenney*, 128 Mass. 284.

<sup>123</sup> *Smith v. Dyer*, 16 Mass. 18; *Dewey v. Van Deusen*, 4 Pick. (Mass.) 19; *Shelton v. Atkins*, 22 Pick. (Mass.) 71; *Root v. Bancroft*, 10 Metc. (Mass.) 49; *Root v. Stow*, 13 Metc. (Mass.) 5.

<sup>124</sup> *Richardson v. Hildreth*, 8 Cush. (Mass.) 225.

<sup>125</sup> *Palmer v. Stevens*, 11 Cush. (Mass.) 147.

<sup>126</sup> *Stover v. Reading*, 29 N. J. Eq. 152.

<sup>127</sup> *Mutual Life Ins. Co. v. Sturges*, 32 N. J. Eq. 679. Cf. ante, p. 457.

<sup>128</sup> *Smith v. Manning*, 9 Mass. 422.

<sup>129</sup> Mass. Pub. St. c. 181, §§ 39, 40.

<sup>130</sup> *Robinson v. Guild*, 12 Metc. (Mass.) 323.

## SUITS ON NOTE PAYABLE TO BEARER.

196d. Suits on bills or notes payable to bearer may be brought by the administrator or executor in his personal capacity.

In suits on bills or notes, if the note is payable to bearer, or indorsed in blank, it may be sued by the administrator in his personal capacity, since he is the bearer, and sues with the consent of the person who is entitled to the proceeds of the note, i. e. himself.<sup>131</sup> The addition of the word "administrator" to the name of the payee of the note is mere description, and does not change the title to the note.<sup>132</sup> One of two joint executors cannot indorse a negotiable note made to both as executors.<sup>133</sup>

<sup>131</sup> Holcomb v. Beach, 112 Mass. 450; Truesdell v. Thompson, 12 Metc. (Mass.) 565; Wheeler v. Johnson, 97 Mass. 39; Gage v. Johnson, 20 Me. 437.

<sup>132</sup> Plimpton v. Goodell, 126 Mass. 119.

<sup>133</sup> Smith v. Whiting, 9 Mass. 334. Cf. ante, p. 174, c. 11.

## CHAPTER XXIII.

### ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS.

- 197-198. Survival of Actions against Executor or Administrator—Contracts.<sup>1</sup>
- 199. Torts.
- 200. Particular Liabilities.
- 201-204. Pleading.
- 205. Judgments, Executions, and Other Proceedings.
- 206-208. Attachment.
- 209-212. Trustee Process.
- 213-215. Suits in Equity.
- 216. Order of Liability of Assets.
- 217-219. Suits on Probate Bonds.

### SURVIVAL OF ACTIONS AGAINST EXECUTOR OR ADMINISTRATOR—CONTRACTS.

**197. An executor or administrator may be sued on any contracts made by the deceased, whether the breach is by the deceased in his lifetime, or by his executor or administrator after his death.**

**198. An exception to this rule exists in case of contracts which call for personal services of the deceased.**

An executor or administrator is bound by all the contracts of the deceased, and may be compelled to perform them, or to respond for the breach thereof in damages,<sup>1</sup> unless the contract is of such a nature as involves the prosecution of the business of the deceased, or is otherwise incompatible with the duties of the executor or administrator in settling the estate.<sup>2</sup>

Claims founded on any obligation, contract, debt, covenant, or other duty of the testator or intestate, upon which he might have been sued in his lifetime, survive his death, and are enforceable against his executor or administrator.<sup>3</sup> Therefore executors or

<sup>1</sup> See, for particular contract obligations, post p. 473.

<sup>2</sup> *Dickinson v. Calahan's Adm'rs*, 19 Pa. St. 227.

<sup>3</sup> *Touch. 482*; *Wheatly v. Lane*, 1 Saund. 216a, note 1; *Harrison v. Sampson*, 2



administrators are liable to be sued for debts of every description due from the deceased,—either debts of record (as judgments, statutes, or recognizances), or debts due on special contract (as for rent or on bonds, covenants, and the like, under seal), or debts on simple contracts (as notes unsealed, and promises not in writing, either express or implied).<sup>4</sup> And this liability is not dependent upon the executor or administrator being named in the contract as one of the parties to it, for the liability is cast upon him by the law, as one of the consequences of his being the personal representative of the deceased.<sup>b</sup>

An exception to the rule of survival of contract obligations is when the contract calls for services which could only be performed by the deceased personally, for the performance of such a contract becomes impossible by the death of the contractor. Thus, if the contract was that the contractor should write a book, or make a painting or engraving, or if it is to another for his personal services as body servant or valet, or in other like capacities, the contract is ended by the death of the deceased, and no liability descends upon the executor or administrator, except for breaches occurring during the life of the contractor.<sup>6</sup> A further exception exists in regard to the somewhat anomalous action for breach of promise of marriage. This contract is not enforceable if there has been no breach before the death of the promisor, upon the principle already stated; and also because, although the contract may have been broken before the death of the promisor, by a refusal to carry it out, or by delay amounting to a refusal, yet no action lies against the executor or administrator, at least unless special damage is

Wash. (Va.) 155; *Lee v. Cooke*, 1 Wash. (Va.) 306; *Holbrook v. White*, 13 Wend. (N. Y.) 591; *Davis v. Pope*, 12 Gray (Mass.) 193; *Corcoran v. Henshaw*, 8 Gray (Mass.) 267; *Childs v. Jordan*, 106 Mass. 321; *Harrison v. Conlan*, 10 Allen (Mass.) 86, per Metcalf, J.; *Parker v. Coburn*, Id. 83; *Jenkins v. Stetson*, 9 Allen (Mass.) 128; *Prescott v. Ward*, 10 Allen (Mass.) 204. Cf., as to survival of actions of contract in favor of executors or administrators, ante, c. 22.

<sup>4</sup> *Williams, Ex'r*, 1721; Bac. Abr. "Executors," p. 1; *Bachelder v. Fiske*, 17 Mass. 464; *How v. How*, 48 Me. 428; *Harbeck v. Pupin*, 8 N. Y. Supp. 695, 55 Hun, 335; *McDaniel v. Parks*, 19 Ark. 671. See Abb. Desc., Wills & Adm. § 156.

<sup>5</sup> Went. Off. Ex'r, pp. 239, 243, c. 11; *Harrison v. Sampson*, 2 Wash. (Va.) 155.

<sup>6</sup> *Harrison v. Conlan*, 10 Allen (Mass.) 86, per Metcalf, J.; *McGill's Creditors v. McGill's Adm'r*, 2 Metc. (Ky.) 258; *Dickinson v. Calahan's Adm'r*, 19 Pa. St. 227.

shown. This has been said to be because the action is rather in the nature of an action of deceit or fraud than an ordinary breach of contract.<sup>7</sup>

In many cases the liability upon contracts of the deceased does not accrue till after his death, but the executor or administrator is liable. Thus he is liable upon a bond which becomes due, or a note payable, subsequent to the death of the testator or intestate, or for the performance of any other contract of the deceased,<sup>8</sup> just as he is for the payment of debts overdue at the death of the deceased.<sup>9</sup>

### SAME—TORTS.

199. An executor or administrator could not, at common law, be sued for torts committed by the deceased to the person or property of another, for which damages only could be recovered; but, if a return of property was the object of the action, as in replevin, the action survived. This rule, so far as it relates to torts, is generally changed by statute so that all actions of tort for damage to person or property, real or personal, and conversion as well as replevin, survive against the executor or administrator of the wrongdoer.

In regard to the enforcement against the executor or administrator of liabilities of the deceased for wrongful acts done by him, the rule of the common law was that, if an injury was done either to the person or property of another for which damages alone could be recovered in satisfaction, the action died with the person by whom the wrong was committed, and the injury was, therefore, irremediable.<sup>10</sup> This rule did not apply where the remedy sought was a return of property wrongfully taken, and therefore

<sup>7</sup> *Stebbins v. Palmer*, 1 Pick. (Mass.) 78; *Chase v. Fitz*, 132 Mass. 359. Cf. ante, p. 446, c. 22.

<sup>8</sup> *Toller*, 463; *Williams, Ex'rs*, 1724; *Davis v. Pope*, 12 Gray (Mass.) 193.

<sup>9</sup> Ante, note 4.

<sup>10</sup> *Wheatly v. Lane*, 1 Saund. 216a, note 1; *Barnard v. Harrington*, 3 Mass. 228. Cf., as to nonsurvival of actions of tort, also, ante, p. 446, c. 22.

the action of replevin survived at common law. The rule of the common law has been largely extended by statute, both in England and the United States. The statutes generally have a similar scope, which is to provide for the survival of all actions giving redress for injuries either to the person or property, real or personal, whether the redress sought is a return of property or a money payment; and provide for the survival of the following actions: Of replevin, of tort, for assault, battery, imprisonment, or other damage to the person; for goods taken and carried away or converted by defendant to his own use; or for damage done to real or personal estate; and actions against a sheriff for malfeasance or nonfeasance of himself or his deputies. Under such statutes it is held that an action of tort survives,<sup>11</sup> e. g. for wrongfully building a dam, and thereby injuring the flow of water over a dam higher up the stream, against the administrator of the one who built the dam, since the act of the defendant's intestate injured the mills and other real estate of the plaintiff.<sup>12</sup> So of other actions for injury to the real estate,<sup>13</sup> or trespass of any kind.<sup>14</sup> But an action for malicious prosecution does not survive against the administrator of the defendant,<sup>15</sup> nor does an action for libel,<sup>16</sup> nor does an action of tort for making false answers as trustee in trustee process,<sup>17</sup> nor an action for fraudulently recommending a trader as in good credit,<sup>18</sup> nor an action for breach of promise of marriage.<sup>19</sup> An action for damages for negligent killing abates

<sup>11</sup> *McKinlay v. McGregor*, 10 Iowa, 111; *Froust v. Bruton*, 15 Mo. 619; *Terhune v. Bray's Ex'rs*, 16 N. J. Law, 54; *Cooper v. Railway Co.*, 56 N. W. 588, 55 Minn. 134.

<sup>12</sup> *Brown v. Dean*, 123 Mass. 254.

<sup>13</sup> *Rabb v. Patterson*, 20 S. E. 540, 42 S. C. 528; *Miller v. Young*, 35 N. Y. Supp. 643, 90 Hun, 132.

<sup>14</sup> *Cowell v. Pitcher*, 13 Pa. Co. Ct. R. 583. But see *Stebbins v. Dean*, 46 N. W. 778, 82 Mich. 385.

<sup>15</sup> *Conly v. Conly*, 121 Mass. 550. Cf. ante, p. 449, c. 22.

<sup>16</sup> *Walters v. Nettleton*, 5 Cush. (Mass.) 544. Cf. ante, p. 449, c. 22.

<sup>17</sup> *Stillman v. Hollenbeck*, 4 Allen (Mass.) 391.

<sup>18</sup> *Read v. Hatch*, 19 Pick. (Mass.) 47. But see *Warren v. Furstenheim*, 35 Fed. 691.

<sup>19</sup> *Weeks v. Mays*, 10 S. W. 771, 87 Tenn. 442. Cf. ante, p. 445, c. 22.

by the death of the defendant before judgment, unless by express statute.<sup>20</sup> So of an action for personal injuries.<sup>21</sup> An action against a liquor dealer for the price of liquor illegally sold to plaintiff survives the defendant's death.<sup>22</sup> An action against an employer for wrongfully dismissing an employé from his service survives against his executors and administrators under a statute providing that an action for "damage to any estate" will survive.<sup>23</sup> An action for making false representations as to the healthfulness of a house survives for the tenant against the lessor's administrator.<sup>24</sup> But an action against a woman for falsely representing that she was single, and thus inducing the plaintiff to marry her, does not survive against her estate.<sup>25</sup> If the question as to the survival of an action of tort arises after the action has been begun, the executor or administrator of the defendant may appear, and move to dismiss the action, or may make such motion when cited to appear by the plaintiff.<sup>26</sup> An action against an executor or administrator to compel an accounting survives.<sup>27</sup> If the cause of action which existed in the lifetime of the deceased has been put in suit against him, and it survives his decease, the executor or administrator must defend the action, if there is a defense. The mode of substituting him as defendant has been very generally regulated by statute, by which the executor or administrator may, if the cause of action survives, be brought into the case, and continue to defend it. Provision is generally made for this being done voluntarily by the executor or administrator, or by compulsion if he does not do so voluntarily, enforced by a default if he does not appear in answer to the summons.<sup>28</sup> The executor or

<sup>20</sup> *Weiss v. Hunsicker*, 14 Pa. Co. Ct. R. 398; *Hamilton v. Jones*, 25 N. E. 192, 125 Ind. 176; *Davis v. Nichols*, 15 S. W. 880, 54 Ark. 358; *Johnson v. Farmer* (Tex. Sup.) 35 S. W. 1062. Cf. ante, p. 451, c. 22.

<sup>21</sup> *Jacksonville St. Ry. Co. v. Chappell*, 1 South. 10, 22 Fla. 616; *Martin's Adm'r v. Railroad Co.*, 14 Sup. Ct. 533, 151 U. S. 673; *Munal v. Brown*, 70 Fed. 967.

<sup>22</sup> *Yeartean v. Bacon's Estate*, 27 Atl. 198, 65 Vt. 516.

<sup>23</sup> *Lee's Adm'r v. Hill*, 12 S. E. 1052, 87 Va. 497.

<sup>24</sup> *Cutter v. Hamlen*, 18 N. E. 397, 147 Mass. 471.

<sup>25</sup> *Payne's Appeal*, 32 Atl. 948, 65 Conn. 397.

<sup>26</sup> *Conly v. Conly*, 121 Mass. 550; *Walters v. Nettleton*, 5 Cush. (Mass.) 544.

<sup>27</sup> *Quick v. Campbell* (S. C.) 22 S. E. 479. Cf. ante, p. 420, c. 20.

<sup>28</sup> Consult local statutes as to this procedure.

administrator should, however, defend the action, if there is a defense; for, if he does not, he will be liable to the estate for negligence in not defending the action, and thus indirectly liable for both the damages and costs of the case.<sup>29</sup>

### *Joint Liabilities in Tort.*

The liability of tort feorsors being joint and several, it seems that, if one dies before suit brought, his estate might be sued, as well as the surviving tort feorsors, in separate actions.<sup>30</sup> If the suit is brought against all the tort feorsors, and one dies, it would seem that the action should be prosecuted against the survivors only.<sup>31</sup>

## **SAME—PARTICULAR LIABILITIES.**

**200. Particular liabilities of executors and administrators will be considered under the following heads:**

- (a) **Covenants.**
- (b) **Liability for rent.**
- (c) **Contracts to buy and sell real estate.**
- (d) **Injuries to real estate.**
- (e) **Partnership debts.**
- (f) **Legacies and distributive shares.**
- (g) **In what state liable.**
- (h) **Suits in federal courts.**

### *Covenants.*

The general rules regarding the liability of executors or administrators to suit having been stated, it remains to investigate particular kinds of liabilities. As to covenants, the rule is that, where a testator or intestate is bound by a covenant, the executor or administrator shall be bound by it, unless it is determined by the death of the testator or intestate; that is, unless it is for the personal service of the deceased.<sup>32</sup> And the executor or admin-

<sup>29</sup> Newcomb v. Goss, 1 Metc. (Mass.) 333. Cf ante, p. 254, c. 15.

<sup>30</sup> Add. Torts, par. 1321.

<sup>31</sup> See Mechanics' & Tradesmen's Ins. Co. v. Spang, 5 Pa. St. 113.

<sup>32</sup> Williams, Ex'rs, 1749; Com. Dig. "Covenant," C, 1.

istrator is liable not only for breaches in the life of the testator or intestate, but for those occurring after his decease.<sup>33</sup>

*Liability for Rent—Covenant.*

So, although a lessee may have assigned his term, yet, as he remains liable on his covenant for rent, his executor will be liable to the landlord, or to the assignee of the landlord, if the landlord has assigned the lease, in an action of covenant.<sup>34</sup> But if the deceased, instead of being the original tenant, was the assignee of the tenant, then he is liable only for breaches of the covenant during the term of his occupation, and therefore his executor or administrator may, by assigning the lease, relieve himself from all future liabilities.<sup>35</sup> If the executor of the lessee assigns the lease, he is still liable upon the covenants of the lessee, although the landlord may have accepted the assignee as tenant, for the covenants bind the lessee and his executors and administrators, even after they have assigned the lease.<sup>36</sup> Upon covenants in law—for example, upon a covenant for quiet enjoyment implied from a demise of land—an executor or administrator is not liable, unless the breach occurred in the life of the deceased.<sup>37</sup>

*Same—Debt or Assumpsit.*

The general rule is that the executor or administrator is liable for rent for any unexpired term under a lease to his testator or intestate. If he has confirmed or accepted the lease as by occupation of the premises, or by taking rent from an under-tenant, or otherwise, he is liable in his personal capacity.<sup>38</sup> If the whole rent was incurred and the lease expired before the death of the deceased, the executor or administrator has no personal liability, but the whole rent is a debt against the estate.<sup>39</sup> As tenancies at will

<sup>33</sup> *Hovey v. Newton*, 11 Pick. (Mass.) 421; *Montague v. Smith*, 13 Mass. 405.

<sup>34</sup> *Brett v. Cumberland*, Cro. Jac. 521; *Thursby v. Plant*, 1 Saund. 241a, note 5; *Greenleaf v. Allen*, 127 Mass. 248.

<sup>35</sup> *Taylor v. Shum*, 1 Bos. & P. 21; *Rowley v. Adams*, 4 Mylne & C. 534.

<sup>36</sup> *Hellier v. Casbard*, 1 Sid. 266; *Coghil v. Frelove*, 3 Mod. 325.

<sup>37</sup> *Swan v. Stransham*, Dyer, 257a; Com. Dig. "Covenant," C, 1.

<sup>38</sup> *Inches v. Dickinson*, 2 Allen (Mass.) 72; *Greenleaf v. Allen*, 127 Mass. 253; *Daniels v. Richardson*, 22 Pick. (Mass.) 568; *Williams, Ex'rs*, 1753; *Boulton v. Canon*, 1 Freem. 337.

<sup>39</sup> 1 Rolle, Abr. 603, S, pl. 9; *Fruen v. Porter*, 1 Sid. 379.

are terminated by the death of the lessee,<sup>40</sup> the executor or administrator is liable only for rent accruing before the death, and then only in his representative capacity and not personally;<sup>41</sup> but, if he continues to occupy, he would be personally liable as an ordinary tenant at will. An assignment of the lease by the lessee during his life relieves his executor or administrator from all liability, except on the covenant for rent, as executor or administrator.<sup>42</sup> If the lease has not been assigned by the lessee, but if an assignment is made by his executor or administrator after entry on the land, he is liable personally for the rent during the time he occupied the land, and as executor for subsequent rent on the covenant for rent.<sup>43</sup>

*Contracts to Buy and Sell Real Estate.*

The executor or administrator may be held liable in certain cases for contracts of the deceased in regard to land or other real estate. It has already been seen that such a liability exists in regard to the covenants of the deceased in his deeds.<sup>44</sup> Another liability arises in regard to contracts of the deceased as to conveyances of land. First, as to his contracts to buy land. It is held in equity that if the deceased had entered into a binding contract for the purchase of land, and died before the payment of the purchase money, he thereby effected a conversion of so much of his estate into realty, and therefore the liability to pay purchase money devolves upon the executor or administrator, although the land goes to the heirs or devisees; and, if the heir pays for the land, he is entitled to be reimbursed out of the personal estate.<sup>45</sup> This liability depends upon the existence of a valid contract for the purchase of the land. If the contract is not completed, or for any reason is not enforceable, the rule does not apply, since the conversion is not effected.<sup>46</sup> A second liability is that, if the deceased had entered into a binding contract for the sale of land, and died

<sup>40</sup> *Rising v. Stannard*, 17 Mass. 284.

<sup>41</sup> *Inches v. Dickinson*, 2 Allen (Mass.) 72.

<sup>42</sup> *Helier v. Casebert*, 1 Lev. 127; *Williams, Ex'rs*, 1751.

<sup>43</sup> *Wilson v. Wigg*, 10 East, 313; *Williams, Ex'rs*, 1750.

<sup>44</sup> *Ante*, p. 473.

<sup>45</sup> *Milner v. Mills*, Mos. 123; *Broome v. Monck*, 10 Ves. 597.

<sup>46</sup> *Green v. Smith*, 1 Atk. 573.

before executing the conveyance, by statute in some states a proceeding is given to the vendee against the executor or administrator, by which the specific performance of the contract of the deceased may be enforced by a decree or order directing the execution of the deed by the executor or administrator.<sup>47</sup> The ordinary rules governing the enforcing of specific performance of contracts in equity apply to such proceedings.<sup>48</sup> At common law the proceeding would be against the heirs or devisees in equity to compel a conveyance, because the title is in them, and the purchase money would be paid to the executor or administrator, on the theory of conversion above mentioned.

### *Injuries to Real Estate.*

In regard to injuries done by the deceased to the real estate of another, if the cause of action is for damages,—for example, trespass quare clausum, or case for injuries,—the executor or administrator is liable, since the action is directed against the personal estate of the deceased.<sup>49</sup> If the action is for the recovery of land of which the deceased wrongfully dispossessed the plaintiff, or in other ways affects the title to or right of possession of the land, it should be against the heirs or devisees, as the title and right to possession is in them.

### *Partnership Debts.*

Creditors of a partnership may in most states proceed for their debts either against the estate of the deceased partner or against the surviving partner, as they wish, without regard to the solvency or insolvency of either; but in case of insolvency they cannot have payment of their debts out of the separate estate of the partners until all the separate creditors are paid.<sup>50</sup> And the rule is generally adopted that partnership debts are to be paid from partnership funds, and separate debts from separate estate; and, if either assumes to receive payments from the other's funds, it must do so

<sup>47</sup> *Ryder v. Robinson*, 109 Mass. 67; *Luchterhand v. Sears*, 108 Mass. 552.

<sup>48</sup> *Miller v. Goodwin*, 8 Gray (Mass.) 544.

<sup>49</sup> *Brown v. Dean*, 123 Mass. 254.

<sup>50</sup> *Lindl. Partn.* 597, 599; *Sampson v. Shaw*, 101 Mass. 145; *Blair v. Wood*, 108 Pa. St. 278; *Simpson v. Schulte*, 21 Mo. App. 639; *Silverman v. Chase*, 90 Ill. 37. Cf. ante, p. 265, c. 22.



subject to the rights of the other.<sup>51</sup> In some states the power of the creditor to pursue his claim against the estate of the deceased partner is somewhat restricted; and it is the law in those states that a creditor of the firm cannot proceed against the estate of a deceased partner until he has shown that he cannot collect his debt from the surviving partner. This rule is based upon the fact that in those states the surviving partner has the sole right of possession of the partnership funds, and that these funds are the primary fund for paying partnership debts. The rule is, therefore, held in these states that the creditor must show that he has proceeded to execution against the surviving partners, and failed to collect his debt, or that the surviving partners are insolvent.<sup>52</sup> It is not necessary, however, that the creditor should show that the surviving partners are insolvent if he shows that he has obtained judgment against them, and had execution issued, and the execution returned unsatisfied by the sheriff; and this is true although evidence is offered to show that there was in fact property belonging to the surviving partners which might have been found by the sheriff, and applied to the payment of the debt.<sup>53</sup> In Massachusetts, by statute, it is provided that, when two or more persons are indebted on a joint contract, or on a judgment founded on a joint contract, and either of them dies, his estate shall be liable therefor, as if the contract had been joint and several, or as if the judgment had been against the deceased alone. The effect of this statute is held to be to make the obligation of a partnership joint and several; and suit may be brought either against the surviving partner or against the estate of the deceased partner,<sup>54</sup> but not against both in one suit.<sup>55</sup> In England, while it is held that the creditor may sue ei-

<sup>51</sup> *Burnside v. Merrick*, 4 Metc. (Mass.) 542.

<sup>52</sup> *Voorhis v. Childs' Ex'r*, 17 N. Y. 356; *Grant v. Shurter*, 1 Wend. (N. Y.) 148; *Pope v. Cole*, 55 N. Y. 124; *Pendleton v. Phelps*, 4 Day (Conn.) 481; *Sturges v. Beach*, 1 Conn. 509; *Alsop v. Mather*, 8 Conn. 584; *Buckingham v. Ludlum*, 37 N. J. Eq. 140.

<sup>53</sup> *Pope v. Cole*, 55 N. Y. 124.

<sup>54</sup> *Curtis v. Mansfield*, 11 Cush. (Mass.) 152; *Sampson v. Shaw*, 101 Mass. 152; Mass. Pub. St. c. 136, § 8.

<sup>55</sup> *New Haven & Northampton Co. v. Hayden*, 119 Mass. 361.

ther the surviving partner or the estate of the deceased for his debt, it was originally held that, if he proceeds against the latter, he must do it in equity, since he has no direct claim at law upon the estate, but only an equitable claim, based on the equity of the surviving partner; but since the judicature act he may sue both at law.<sup>56</sup> In Massachusetts, as has been seen, the action against the estate is at law;<sup>57</sup> and this is the rule in Pennsylvania.<sup>58</sup> But in New York and New Jersey the action must be in equity.<sup>59</sup>

*Same—Separate Creditors' Right to Sue Surviving Partner.*

Separate creditors of the deceased partner cannot generally sue the surviving partners. The executor or administrator of the deceased alone has the right to call the surviving partners to account, and compel them to surrender the share of the firm assets which belongs to the estate of the deceased partner.<sup>60</sup> There are, however, cases in which the executor or administrator has put it out of his power to call the surviving partner to account. In such cases, in England, it is held that the surviving partners may be made parties defendant in a suit in equity by a separate creditor, along with the personal representative. These cases are where there is collusion between the personal representative and the surviving partners,<sup>61</sup> or refusal by the former to compel the latter to account,<sup>62</sup> or dealings which preclude the personal representatives from compelling the accounts,<sup>63</sup> or the fact that the executors or administrators are themselves partners, and liable, therefore, to account to themselves as executors,<sup>64</sup> and generally whenever cir-

<sup>56</sup> Lindl. Partn. \*598, \*603; Pope v. Cole, 55 N. Y. 127; Voorhis v. Childs' Ex'r, 17 N. Y. 355.

<sup>57</sup> Sampson v. Shaw, 101 Mass. 145.

<sup>58</sup> Blair v. Wood, 108 Pa. St. 278; Miller v. Reed, 27 Pa. St. 244; Brewster's Adm'r v. Sterrett, 32 Pa. St. 115.

<sup>59</sup> Pope v. Cole, 55 N. Y. 127; Buckingham v. Ludlum, 37 N. J. Eq. 140.

<sup>60</sup> Lindl. Partn. \*611; Stainton v. Carron Co. 18 Beav. 146; Harrison v. Righ-ter, 11 N. J. Eq. 389; Rosenzweig v. Thompson, 8 Atl. 659, 66 Md. 593. Cf. ante, p. 240, c. 14.

<sup>61</sup> Doran v. Simpson, 4 Ves. 651; Gedge v. Traill, 1 Russ. & M. 281, note.

<sup>62</sup> Burroughs v. Elton, 11 Ves. 29.

<sup>63</sup> Law v. Law, 2 Colly. 41, 11 Jur. 463.

<sup>64</sup> Beningfield v. Baxter, 12 App. Cas. 167.

cumstances exist which prevent the representatives of the deceased partner from calling upon the surviving partners to account.<sup>65</sup>

*Same—Continued Business of Partnership.*

A deceased partner's estate is not liable for debts contracted by the surviving partner wrongfully carrying on business subsequent to his death.<sup>66</sup> Nor is it necessary that the surviving partners or representatives of the deceased partner should give notice of the dissolution in order to avoid further liability, even though one of the surviving partners fraudulently uses the name of the late firm to obtain money or goods from a customer of the old firm who did not know of the death of the deceased partner.<sup>67</sup> If the administrator, after the death of the deceased partner, joins the surviving partner in continuing the business, his dealings with strangers do not affect the estate with any liability to creditors, but the executor or administrator himself becomes personally liable on such debts.<sup>68</sup> If, however, he contract these debts while he is carrying on the business of the deceased partner with the surviving partners by direction of the deceased partner, or by direction of those who are entitled to the estate, or, in case of an executor, by direction of the will, he is entitled to indemnify himself for these debts out of the estate.<sup>69</sup> As a consequence of this right to indemnification, it is held that a creditor whose debt was thus contracted by an executor or administrator has the right in equity to stand in place of the executor or administrator so far as this right of indemnification is concerned, and may, therefore, subject the estate, or so much of it as the testator has directed to be employed in his business, to the payment of his debt. This is said by Mr. Lindley, in his work on Partnership, to be on the theory that a trust fund expressly devoted to the purpose of carrying on the business is created by the direction of the deceased, or those entitled to the estate, as to the business. Unless such a fund exists, the right of the creditor to

<sup>65</sup> *Travis v. Milne*, 9 Hare, 150.

<sup>66</sup> *Marlett v. Jackman*, 3 Allen (Mass.) 290; *Tyrrell v. Washburn*, 6 Allen (Mass.) 466; *Bacon v. Pomeroy*, 104 Mass. 582.

<sup>67</sup> *Marlett v. Jackman*, 3 Allen (Mass.) 290; *Vulliamy v. Noble*, 3 Mer. 614; *Washburn v. Goodman*, 17 Pick. (Mass.) 519.

<sup>68</sup> *Bradley v. Brigham*, 10 N. E. 793, 144 Mass. 183.

<sup>69</sup> *Lindl. Partn.* \*604, \*605.

look to the estate for his debt would fail.<sup>70</sup> When a deceased partner directs by will or otherwise that his business shall be continued, he subjects only that portion of his estate which is already embarked in the business, or which he directs to be so embarked, to the payment of the partnership debts, unless he expresses or clearly implies an intention to subject his general assets to those debts.<sup>71</sup> If the business is so continued by the executor, and the firm goes into bankruptcy, the executor may prove against the joint creditors for all the assets of the estate which he wrongfully put into the business, for that money was trust money unlawfully used; but for all that he rightfully put into the business under the direction of the testator he cannot prove.<sup>72</sup>

If the partnership articles contain an agreement that the executor of the deceased partner shall take the place of the testator in the partnership, or give him an option to take such place, this alone does not constitute the executor a partner, or continue the liability of the estate for losses. There should be some act of the executor by which he joins the partnership; and this, if it is done by the direction of the testator, subjects the estate, as has been already seen, to liability to the creditors of the firm, or to losses of the firm.<sup>73</sup> But if the partnership was formed with a capital stock consisting of transferable shares, and certificates of shares were issued, and it was stipulated in the agreement of partnership that "the decease of a member of the association shall not work a dissolution of it, nor shall it entitle his legal representatives to an account, or to take any action, in the courts or otherwise, against the association or the trustee for such, but they shall simply succeed to the right of the deceased to the certificate and the shares it represents, subject to this declaration of trust," this clause continues the liability of the estate for losses of the partnership; and a member of the association, who had been sued and compelled to pay a

<sup>70</sup> Lindl. Partn. \*606, \*607, \*609; *Jones v. Walker*, 103 U. S. 444; *Smith v. Ayer*, 101 U. S. 320.

<sup>71</sup> *In re Johnson*, 15 Ch. Div. 548; *Pitkin v. Pitkin*, 7 Conn. 307; *Burwell v. Mandeville's Ex'r*, 2 How. 560; *Jones v. Walker*, 103 U. S. 444; Lindl. Partn. \*609.

<sup>72</sup> Lindl. Partn. \*608, \*609; *Ex parte Garland*, 10 Ves. 110.

<sup>73</sup> *Laughlin v. Lorenz*, 48 Pa. St. 275.

partnership debt, may maintain a bill in equity for contribution against the representatives of the estate of the deceased partner.<sup>74</sup>

*Actions for Legacies and Distributive Shares.*

Actions for legacies have been previously discussed.<sup>75</sup> Actions for distributive shares have also been previously discussed.<sup>76</sup>

*In What State Liable.*

It has already been seen<sup>77</sup> that an executor or administrator is liable in his representative capacity to suit only in the state in which he has been appointed,<sup>78</sup> but, if he collects assets in another state, he may be liable there, as a wrongdoer, to the local executor or administrator.<sup>79</sup> A judgment obtained in one state against an administrator cannot be enforced in another state against another administrator because of lack of privity,<sup>80</sup> or against an executor on a judgment obtained against an ancillary administrator in another state for the same reason;<sup>81</sup> nor would a judgment against an executor, qualified in one state, be conclusive against a co-executor, qualified in another state, but it has been said that it might be admissible in evidence for certain purposes.<sup>82</sup>

*Suits in Federal Courts.*

The court in which actions against an executor or administrator must be brought is decided by the local practice. One point, however, deserves especial notice, and it is the question whether suits can be brought in the federal courts on a demand against an executor or administrator, particularly when the estate is insolvent. It has already been seen that in most states insolvent estates are settled by filing all claims in the probate or some similar court, and then distributing the assets proportionately, and that any creditor who does not so

<sup>74</sup> Phillips v. Blatchford, 137 Mass. 512.

<sup>76</sup> Ante, p. 398, c. 19.

<sup>75</sup> Ante, p. 360, c. 18.

<sup>77</sup> Ante, p. 162, c. 10.

<sup>78</sup> Norton v. Palmer, 7 Cush. (Mass.) 523, 524; Goodall v. Marshall, 11 N. H. 88; Pond v. Makepeace, 2 Metc. (Mass.) 114; Cutter v. Davenport, 1 Pick. (Mass.) 86.

<sup>79</sup> Williams, Ex'rs, 2042.

<sup>80</sup> Stacy v. Thrasher, 6 How. (U. S.) 44; Slaughter v. Chenowith, 7 Ind. 211; Jones v. Jones, 15 Tex. 463; King v. Clarke, 2 Hill (S. C.) 611. Cf. ante, p. —, c. 21.

<sup>81</sup> Low v. Bartlett, 8 Allen (Mass.) 262. But see Latine v. Clements, 3 Kelly (Ga.) 426.

<sup>82</sup> Hill v. Tucker, 13 How. (U. S.) 458; Goodall v. Tucker, 13 How. (U. S.) 469.

file his claim is barred.<sup>83</sup> It has, however, been held in the supreme court of the United States that, when a creditor and the executor or administrator are residents of different states, the creditor may bring suit in the circuit court of the United States, and establish his debt by a judgment, even when the estate is being distributed as an insolvent estate in the probate court of the state; and, if there proves to be a surplus over other debts, the creditor may have a judgment for his debt against the surplus.<sup>84</sup> But he cannot have execution, and levy on the property of the estate, if it has been duly reported as insolvent, and is being distributed as such in the state court, for that would give him an illegal preference.<sup>85</sup> It does not appear to have been yet decided what measures the federal courts will take to give such judgment creditor an equality in distribution with the creditors who have proved in the state courts, but they have asserted the right to do so.<sup>86</sup>

#### PLEADING.

201. In suits against executors or administrators, causes of action against the defendant personally cannot be joined with causes of action against him in his representative capacity, unless this joinder is authorized by statute.
202. An executor or administrator may set up any defense which the deceased might have availed himself of.
203. An executor or administrator may have also certain special defenses, among which are the following:
- (a) That he is not executor or administrator.
  - (b) That the claim is barred by statutory limitation or nonclaim.
  - (c) Set-off.

<sup>83</sup> Ante, p. 342, c. 17.

<sup>84</sup> *Green's Adm'x v. Creighton*, 23 How. 90; *Suydam v. Brodnax*, 14 Pet. 67; *President, etc., of Union Bank v. Vaiden*, 18 How. 503.

<sup>85</sup> *Williams v. Benedict*, 8 How. 107; *Peale v. Phipps*, 14 How. 368; *President, etc., of Bank of Tennessee v. Horn*, 17 How. 157. Cf. ante, p. 322, c. 17, as to preferences in paying debts.

<sup>86</sup> *Green's Adm'x v. Creighton*, 23 How. 90.

(d) **Insufficiency of assets to pay the claim, or insolvency of the estate.**

**204. Several executors may plead separate defenses.**

*Joinder of Counts.*

As to joinder of causes of action against an executor or administrator at common law, the rule is that counts against him in his representative capacity cannot be joined with counts against him personally, because the judgments would be different, in one case being *de bonis testatoris* and in the other *de bonis propriis*; and this misjoinder is matter of substance, available on general demurrer, or error, or in arrest of judgment.<sup>87</sup> Therefore a count for money had and received by the defendant, as executor or administrator, for the plaintiff's use, or for money lent to the defendant as executor or administrator, or for interest thereon, cannot be joined to a count on a promise by the testator or intestate.<sup>88</sup> For the same reason, a count upon a promise by the defendant, as executor or administrator, to pay for use and occupation of premises after the death of the deceased, cannot be joined in the same declaration with a promise of the deceased to pay rent.<sup>89</sup> So a count for goods sold to, or work done for, the defendant as executor or administrator, cannot be joined with a count for a debt due from the defendant in his representative capacity, for the liability of the defendant for work done is personal, and not representative.<sup>90</sup> But a count on an account stated, or of money paid to the use of defendant as executor, may be joined with a count on a promise of the testator, since all counts would then be in the representative capacity, and judgment *de bonis testatoris*.<sup>91</sup> And in any case, where all the counts are such

<sup>87</sup> *Jennings v. Newman*, 4 Term R. 347; *Rose v. Bowler*, 1 H. Bl. 108; *Seip v. Drach*, 14 Pa. St. 352; *Schlicker v. Hemenway*, 42 Pac. 1063, 110 Cal. 579; *Moody v. Ewing's Ex'rs*, 8 B. Mon. (Ky.) 521; *Godbold v. Roberts*, 20 Ala. 354; *Myer v. Cole*, 12 Johns. (N. Y.) 349; *Demott v. Field*, 7 Cow. (N. Y.) 58; *Reynolds v. Reynolds*, 3 Wend. (N. Y.) 244; *Gillet v. Hutchinson's Adm'rs*, 24 Wend. (N. Y.) 184.

<sup>88</sup> *Coryton v. Lithébye*, 2 Saund. 117h, note.

<sup>89</sup> *Wigley v. Ashton*, 3 Barn. & Ald. 101.

<sup>90</sup> *Corner v. Shew*, 3 Mees. & W. 350. Cf. ante, p. 259, c. 15.

<sup>91</sup> *Williams, Ex'rs*, 1939, 1940.

that judgment will be *de bonis testatoris*, and not *de bonis propriis*, the counts are rightly joined, although some of the counts are on a promise by the testator and some on a promise by the executor, as such, on a liability existing in the life of the testator or intestate.<sup>92</sup> And if suit is brought against the executor or administrator in his representative capacity, no judgment personally against him can be rendered.<sup>93</sup>

*Defenses by Executor or Administrator.*

As to defenses, the executor or administrator can make any defense which would have been pleadable by the testator or intestate,<sup>94</sup> and, in addition, he may deny his official character by pleading *ne unques executor*; or, admitting it, he may plead that he has no assets or debts of a superior degree sufficient to exhaust the assets;<sup>95</sup> or he may plead the special statute of limitation of actions or nonclaim against executors or administrators; or he may represent the estate insolvent. If the defendant controverts the fact of the representative character by the plea of *ne unques executor* or administrator, the burden of proving the affirmative is on the plaintiff, who must prove, not only the appointment of the defendant to that office, but that he has taken upon himself the trust; and this may be by his proving the will, or taking the oaths and giving bond, or, if he is charged as executor *de son tort*, by proving acts of intermeddling with the estate. The plaintiff should always take the precaution where this plea is pleaded to serve the defendant with notice to produce the letters testamentary or letters of administration at the trial, they being presumed to be in his possession, in order to lay a foundation for the introduction of secondary evidence.<sup>96</sup> If the defendant refuses to produce the letters, the plaintiff may prove the representa-

<sup>92</sup> *Carter v. Phelps' Adm'r*, 8 Johns. (N. Y.) 440; *Malin v. Bull*, 13 Serg. & R. (Pa.) 441; *Cawley v. Reeve*, 17 N. J. Law, 415; *Vaughn's Ex'r v. Gardner*, 7 B. Mon. (Ky.) 326; *Howard's Adm'rs v. Powers*, 6 Ohio, 92.

<sup>93</sup> *Phillips v. Sanchez*, 17 South. 363, 35 Fla. 187; *Insley v. Shire*, 39 Pac. 713, 54 Kan. 793; *Senescal v. Bolton* (N. M.) 34 Pac. 446; *Jones v. Perot*, 34 Pac. 728, 19 Colo. 141.

<sup>94</sup> Com. Dig. "Pleader," 2 D 8.

<sup>95</sup> *Tidd, Prac.* (9th Ed.) 644.

<sup>96</sup> 2 Saund. Pl. & Ev. 511, 512; 2 Greenl. Ev. § 344; 2 Starkie, Ev. 320; *Douglas v. Forrest*, 4 Bing. 686, 704; *Atkins v. Tredgold*, 2 Barn. & C. 23, 30; *Cottle v. Aldrich*, 4 Maule & S. 175.



tive capacity of the defendant by a certified copy of the decree of the probate court granting administration.<sup>97</sup> He must also give some evidence of the identity of the party defendant with the person described in the letters as executor or administrator. If the evidence shows the defendant liable as an executor de son tort by intermeddling, he may discharge himself by proof that he delivered over the goods to the rightful executor before action brought, but not afterwards;<sup>98</sup> or that he subsequently took out letters of administration, and has administered the estate according to law.<sup>99</sup> If there are several defendants who plead *ne unques executor*, and the issue is against some and in favor of others, the plaintiff may have judgment against those that are executors or administrators, if the action is upon a promise of the deceased, but not if it is upon a joint promise of the defendants as executors or administrators.<sup>100</sup> It is a good plea to a suit against him in his representative capacity if the executor or administrator plead that he has been removed from office, and paid over all the estate to his successor in office; and this plea is good even though the removal took place after the beginning of the suit.<sup>101</sup>

*Pleas by Several Executors.*

In England it has been held that, if there are several executors or administrators, they may all plead separate pleas, and it is said that the one to the greatest advantage of the estate will be received. So, if in an action of *assumpsit* three of four executors pleaded *non-assumpsit*, and the fourth acknowledged the action, the former plea was received.<sup>102</sup> But in a case in New York it is said that the executor or administrator who first pleads has the right alone, and that it is irregular for the others to put in different pleas;<sup>103</sup> and in

<sup>97</sup> Day v. Floyd, 130 Mass. 488.

<sup>98</sup> Curtis v. Vernon, 3 Term R. 587; Vernon v. Curtis, 2 H. Bl. 18; Andrew v. Gallison, 15 Mass. 325, note.

<sup>99</sup> Shillaber v. Wyman, 15 Mass. 322; Andrew v. Gallison, *Id.* 325, note.

<sup>100</sup> Griffiths v. Franklin, Moody & M. 146; Atkins v. Tredgold, 2 Barn. & C. 30. Cf. ante, p. 468.

<sup>101</sup> Jewett v. Jewett, 5 Mass. 275.

<sup>102</sup> Chaffe v. Kelland, 1 Rolle, Abr. 929, tit. "Executors," A. pl. 1; Went. Off. Ex'r, 212.

<sup>103</sup> Salters v. Pruyn, 15 Abb. Prac. 224.

a case in Louisiana it is said that they must agree, and cannot file inconsistent pleas.<sup>104</sup>

### *Bankruptcy.*

Bankruptcy or insolvency of the executor or administrator is no bar to an action, unless it is brought upon a personal responsibility.<sup>105</sup> The effect of insolvency of the estate is discussed in an earlier chapter.<sup>106</sup> If the executor or administrator becomes liable to the estate by defalcation, his discharge in bankruptcy does not discharge him, because it is a debt created by "the fraud or embezzlement of the administrator, and by his defalcation while acting in a fiduciary capacity, and is not barred by the provisions of the bankrupt act, or by a discharge thereunder."<sup>107</sup>

### *Statute of Limitations.*

Reference has already been made to the duty of the executor or administrator in regard to the statute of limitations.<sup>108</sup> As to the mode of pleading by the plaintiff when he intends to rely on a new promise by the executor or administrator to avoid the statute, he should, it is said, insert counts on a promise by the executor or administrator as such, in addition to the promise by the testator.<sup>109</sup> A mere acknowledgment of an indebtedness of the testator is not sufficient to avoid the bar of the statutes. There must be an express promise by the executor or administrator to pay the debt.<sup>110</sup> A fuller consideration of the statute of limitations will be made in a later chapter.

### *Set-Off—Tender.*

An executor or administrator cannot set off a debt due to him personally when he is sued as executor or administrator, because the

<sup>104</sup> Succession of Hilligsberg, 5 La. Ann. 118.

<sup>105</sup> Serle v. Bradshaw, 2 Crompt. & M. 148.

<sup>106</sup> Ante, p. 342, c. 17.

<sup>107</sup> Light v. Merriam, 132 Mass. 283.

<sup>108</sup> Ante, p. 339, c. 17. See, also, post, p. 527, c. 24.

<sup>109</sup> Parke, B., in Browning v. Paris, 5 Mees. & W. 120.

<sup>110</sup> Tullock v. Dunn, Ryan & M. 417; Peck v. Botsford, 7 Conn. 172; Hammon v. Huntley, 4 Cow. (N. Y.) 493; Cayuga Bank v. Bennett, 5 Hill (N. Y.) 236; Forsyth v. Ganson, 5 Wend. (N. Y.) 558; Oakes v. Mitchell, 15 Me. 360; McIntire v. Morris' Adm'rs, 14 Wend. 90. See post, p. 528, c. 24.

debts set off must be due in the same right.<sup>111</sup> But a debt due to the deceased may be set off in an action of assumpsit against the administrator or executor on an account stated by him, for the account only states a debt of the deceased, and not a personal liability of the executor or administrator.<sup>112</sup> A plea of tender by an executor or administrator must aver that the deceased was at all times ready to pay the debt up to the time of his death, and that the executor or administrator has at all times since then been ready to pay.<sup>113</sup>

*Plene Administravit.*

The executor or administrator at common law was obliged to plead a plea of plene administravit, unless he wished to be charged with assets; for judgment against him on demurrer or default, or any plea except that, was considered to be an admission of assets sufficient to satisfy the judgment.<sup>114</sup> But if he pleaded plene administravit, and it was found that assets remained in his hands unadministered, it was held that he was liable for the amount of those assets, but not for the whole debt.<sup>115</sup> The plea of plene administravit is recognized in the United States as negating any admission of assets,<sup>116</sup> but it is little used in connection with the system of distributing estates as established by statute in the United States.<sup>117</sup> Its place is taken by an answer setting forth the condition of the estate and the mode in which the assets have been distributed in paying superior debts, or that the debt in question is barred by nonclaim or limitations. A

<sup>111</sup> *Bishop v. Church*, 3 Atk. 691; *Gale v. Luttrell*, 1 Younge & J. 180. For further discussion, see post, p. 541, c. 24.

<sup>112</sup> *Blakesley v. Smallwood*, 8 Q. B. 538; *Rees v. Watts*, 11 Exch. 416.

<sup>113</sup> *Clemens v. Reynolds*, Sayer, 18. Cf. post, p. 541, c. 24.

<sup>114</sup> *Wheatley v. Lane*, 1 Saund. 219b, note.

<sup>115</sup> *Cousins v. Paddon*, 2 Crompt., M. & R. 558; *In re Higgins' Trusts*, 2 Giff. 562.

<sup>116</sup> *Platt v. Robins*, 1 Johns. Cas. (N. Y.) 278; *Judge of Probate v. Lane*, 50 N. H. 556; *Huger v. Dawson*, 3 Rich. Law (S. C.) 328; *Dorsey v. Hammond*, 1 Bland (Md.) 463; *Lenoir v. Winn*, 4 Desaus. Eq. (S. C.) 65; *White v. Archbill*, 2 Sneed (Tenn.) 588; *Newcomb v. Goss*, 1 Metc. (Mass.) 333.

<sup>117</sup> *U. S. v. Hoar*, 2 Mason, 317, 318, Fed. Cas. No. 15,373. See, also, *Haines v. Price*, 20 N. J. Law, 480; *Sawyer v. Sexton*, 1 Tayl. (N. C.) 137; *White v. Arrington*, 3 Ired. (N. C.) 166; *Huger v. Dawson*, 3 Rich. Law (S. C.) 328; *Niron's Adm'rs v. Bullock*, 9 Yerg. (Tenn.) 414. But the plea is not good under the New York statutes. *Allen v. Bishop's Ex'rs*, 25 Wend. 415. See Abb. Desc., Wills & Adm. § 168. Cf. ante, p. 304, c. 17.

plea that the defendant has no goods to be administered is a good plea of plene administravit, without saying anything about the real estate. Under such a plea it may be shown that the estate has been settled in insolvency.<sup>118</sup>

### *Insolvency of Estate.*

In many states there are statutes relating to insolvency of estates, by which, if there are debts which amount to more than the assets of the estate, the executor or administrator may represent the estate as insolvent at any time before judgment, and the case then proceeds to judgment, but no execution issues. If he does not represent the estate insolvent when it really is, and he knows it is, until after judgment, he is estopped from doing so after judgment, and must be held liable de bonis propriis.<sup>119</sup>

## JUDGMENTS, EXECUTIONS, AND OTHER PROCEEDINGS.

**205. When the executor or administrator is sued in his representative capacity upon a cause of action which cannot be supported against him except as such representative, the judgment is against the assets of the estate. If there are none, a judgment for future assets may be entered. Execution issues primarily against assets of the estate.**

### *Judgment for Future Assets.*

At common law, a creditor might escape the effect of a plea of plene administravit by admitting its correctness, and taking judgment of assets in the future; that is, quando acciderint.<sup>120</sup> This judgment would be final if the action were on a liquidated claim; and, if the claim were not liquidated, then there should be a writ of inquiry or a trial by jury to assess damages.<sup>121</sup> But, if he takes issue on the plea of plene administravit, and it is found

<sup>118</sup> Potter v. Dolan (R. I.) 34 Atl. 1116.

<sup>119</sup> Newcomb v. Goss, 1 Metc. (Mass.) 333. See ante, p. 342, c. 17.

<sup>120</sup> Noell v. Nelson, 2 Saund. 226; Parker v. Dee, 3 Swanst. 532; Skinner v. Frierson, 8 Ala. 915; Miller v. Towles, 4 J. J. Marsh. (Ky.) 255; Wilt v. Bird, 7 Blackf. (Ind.) 258.

<sup>121</sup> Tidd, Prac. (9th Ed.) 683.

against him, it is held, in England, that he cannot have judgment of assets quando acciderint.<sup>122</sup> But in the United States it seems that he may have judgment for assets quando acciderint.<sup>123</sup> If the plaintiff confesses the plea of plene administravit, and takes judgment for assets quando acciderint, this judgment binds all assets which accrue subsequent to the filing of the plea.<sup>124</sup> The necessity for this procedure is obviated in many states by statutes which allow the probate court to reserve assets for payment of future claims.<sup>125</sup>

*Execution and Other Proceedings.*

The proceedings subsequent to judgment de bonis testatoris in an action at law against an executor or administrator are primarily against the estate of the deceased. Execution may be issued against the goods and estate in the hands of the executor or administrator by a writ of fieri facias de bonis testatoris;<sup>126</sup> and in some states, by statute, an execution may be levied upon the real estate for the same purpose,<sup>127</sup> or upon scire facias it may be taken.<sup>128</sup> In many of the United States, if the cause of action was against the executor or administrator in his representative capacity, no proceedings can be had on judgment to subject the defendant to a personal liability. At common law, if the judgment was not satisfied by the scire facias or execution, and the sheriff returned nulla bona, and suggested waste, the executor or administrator might be taken and imprisoned in the same way as for a debt of his own, or execution against his own goods might be had; but in the United States it is generally the rule that the execution cannot issue directly against the person or estate of the executor or administrator except for costs, but only upon a scire facias.<sup>129</sup> Even at common law it was more com-

<sup>122</sup> 1 Rolle, Abr. 929, B. pl. 2; Noell v. Nelson, 2 Saund. 217, note 1.

<sup>123</sup> Burnes v. Burton, 1 A. K. Marsh. 349; Osterhout v. Hardenbergh, 19 Johns. (N. Y.) 266.

<sup>124</sup> Orcutt v. Orms, 3 Paige (N. Y.) 459.

<sup>125</sup> See ante, p. 336, c. 17.

<sup>126</sup> Williams, Ex'rs, 1983; Greenwood v. Spiller, 3 Ill. 502; Scott v. Whitehill, 1 Mo. 764.

<sup>127</sup> Mass. Pub. St. c. 172, §§ 55-57.

<sup>128</sup> Murphy's Appeal, 8 Watts & S. 165.

<sup>129</sup> Look v. Luce, 136 Mass. 249.

mon to have the execution returned unsatisfied, and then a scire fieri inquiry to be made as to waste,—which was merely formal, to establish proof of waste on the record,—and then a scire facias issued to the defendant to show cause why the execution should not issue de bonis propriis;<sup>130</sup> and this mode is substantially adopted in some states, except that the scire fieri inquiry is sometimes omitted, and the question of waste is tried upon the scire facias.<sup>131</sup>

### *Debt on Judgment.*

Another mode of enforcing the judgment de bonis testatoris against the goods or estate of the executor or administrator at common law is by action of debt on the judgment suggesting a devastavit or waste. This form of action is founded on the judgment obtained against the executor or administrator, which is conclusive of assets. Therefore the judgment, the execution, and sheriff's return of nulla bona, prove the case.<sup>132</sup> At common law, neither to the scire facias nor to the action of debt on the judgment can the defendant set up want of assets, for the judgment concludes him on this point;<sup>133</sup> and the only defense he can make is that there were goods which might have been taken to satisfy the execution, and that he showed them to the sheriff.<sup>134</sup> But in the United States the strictness of this rule has sometimes been relaxed, and it has been held that the executor or administrator may controvert the fact of assets or waste, and go into the whole case.<sup>135</sup> It has been said in Massachusetts that the action of debt

<sup>130</sup> Williams, Ex'rs, 1983, 1984.

<sup>131</sup> Mass. Pub. St. c. 166, § 10; Cooper v. Hanna, 2 Ind. 97; Peaslee v. Kelley, 38 N. H. 372; Cude v. Spence, 7 Humph. (Tenn.) 278; Cope v. McFarland, 2 Head (Tenn.) 543; People v. Judges of Court of Common Pleas of Erie Co., 4 Cow. (N. Y.) 445; Hussey v. White, 10 Serg. & R. (Pa.) 346.

<sup>132</sup> Williams, Ex'rs, 1987, 1988; Burnley v. Lambert, 1 Wash. (Va.) 308; Sampson v. Payne's Ex'r, 5 Munf. (Va.) 176; Burke v. Adkins, 2 Port. (Ala.) 236.

<sup>133</sup> Williams, Ex'rs, 1985, 1988; Eppes' Adm'rs v. Smith, 4 Munf. (Va.) 466; Cude v. Spence, 7 Humph. (Tenn.) 278; Moore v. Martindale, 2 Blackf. (Ind.) 353.

<sup>134</sup> Williams, Ex'rs, 1988.

<sup>135</sup> Whitney v. Pinney, 53 N. W. 198, 51 Minn. 146. Lee v. Gardiner, 26 Miss. 521; Mass. Pub. St. c. 166, § 10; Jenkins v. Wood, 10 N. E. 818, 144 Mass. 243. See, also, Cude v. Spence, 7 Humph. (Tenn.) 278; Cogan v. Duncan, 23 Miss. 274; Loftus v. Locker, 1 J. J. Marsh. (Ky.) 297.

on a judgment and a suggestion of waste has never been adopted in that state, and that the only way in which the executor or administrator can be held personally liable is by the process of scire facias, mentioned above, which is enacted by statute in that state.<sup>136</sup> That case was an action on a judgment against the executor for a debt due by the testatrix. The case was decided upon the special statute of limitations, the suit on the judgment having been begun more than two years after the defendant had filed his bond; and the court held that the action was a new suit, and therefore barred by the statute, but also went on to say that the scire facias is the only mode of enforcing the judgment against the executor or administrator personally.<sup>137</sup> Another remedy against the executor or administrator personally is the suit on his probate bond, which will be considered later.<sup>138</sup>

*Enforcing Judgment Rendered against Testator or Intestate.*

If a defendant died after judgment and before execution, there were two ways at common law in which execution might be enforced,—one by action of contract on the judgment against the executors or administrators; the other by scire facias on the judgment for the issuing of execution thereon against the executor or administrator;<sup>139</sup> but no action of debt on a suggestion of waste would lie, for there is no admission of assets against the executor or administrator.<sup>140</sup> In England the practice originally was to issue execution on the judgment, even after the death of the defendant, at any time within a year from the rendition of judgment, dating it during the lifetime of the defendant; but this practice was stopped by statutory provision that the execution must be dated on the day it is actually issued, and never has obtained in the United States.<sup>141</sup> If issued in his life, the execution might, in England, be levied after the death of the defendant, although the more regular practice was to revive the judg-

<sup>136</sup> *Jenkins v. Wood*, 2 N. E. 780, 140 Mass. 66.

<sup>137</sup> *Jenkins v. Wood*, 134 Mass. 115.

<sup>138</sup> *Post*, p. 518.

<sup>139</sup> *Knapp v. Knapp*, 134 Mass. 354; *Tidd, Prac.* (9th Ed.) 1119; *Heapy v. Par- ris*, 6 Term R. 368; *Bragner v. Langmead*, 7 Term R. 20.

<sup>140</sup> *Williams, Ex'rs*, 1991.

<sup>141</sup> *Williams, Ex'rs*, 1991; *Hildreth v. Thompson*, 16 Mass. 191.

ment against the executors or administrators by a writ of scire facias against them, to show cause why the execution should not be satisfied out of the goods which belonged to the testator or intestate at the time of his death, and were in the hands of the executor or administrator to be administered.<sup>142</sup> In the United States, even if execution is issued before the death of the defendant, it cannot be levied after his death.<sup>143</sup> But, if an attachment of the goods has been made, the execution may be levied after his death to enforce the lien, if the execution was issued in his lifetime, unless the attachment has been by statute dissolved by taking administration.<sup>144</sup> The practice of issuing a scire facias against the executors or administrators when the defendant dies after judgment, as it obtains in England, is not adopted in the United States; and from the statutory provisions as to the settlement of estates it would not be possible,<sup>145</sup> as the death of the decedent stops all proceedings till the estate is ready for settlement.

If the defendant dies before judgment, and the executor or administrator does not appear, or appears and defends the suit unsuccessfully, the judgment and execution, if not against the executor or administrator personally, are against the goods of the testator in the hands of the executor or administrator, as has been seen.<sup>146</sup> Such an execution may be levied on any goods of the deceased, so long as the property in them is in the administrator or executor. But this liability to execution may be ended by a change in the ownership of the goods, by which they become the goods of some one else; as by a sale by the executor or administrator. But merely charging himself with the goods in his inventory and account does not transfer the property in them to him in his own right, so as to bar the liability of the goods as goods of the estate.<sup>147</sup> Whether a payment of debts due by the estate, to the value of the goods, by the executor out of his own

<sup>142</sup> 1 Chit. Archb. 569; *Wheatley v. Lane*, 1 Saund. 219f; Tidd. Prac. (9th Ed.) 1119; *Williams, Ex'rs*, 1991, 1992.

<sup>143</sup> *Jewett v. Smith*, 12 Mass. 309.

<sup>144</sup> *Grosvenor v. Gold*, 9 Mass. 209. See post, p. 493.

<sup>145</sup> *Jewett v. Smith*, 12 Mass. 309.

<sup>146</sup> Ante, p. 489.

<sup>147</sup> *Weeks v. Gibbs*, 9 Mass. 74.



funds, would transfer to him the absolute property in the goods charged in the account, so as to free them from liability on execution, or not, is queried in one case, but not decided.<sup>148</sup> This liability to execution may, as has been before stated, be prevented by a representation of insolvency duly made by the executor or administrator before the judgment in the suit; but, if the suit is allowed to go to judgment, it is afterwards too late to object.<sup>149</sup>

### ATTACHMENT.

**206. Death of a defendant does not of itself destroy an attachment lien, and execution may issue on the attachment.**

**207. Death of a defendant, and administration taken out, dissolves an attachment lien on his property by statute in many states.**

**208. For a debt due by the deceased his goods cannot be attached after his death. For a claim against the executor or administrator personally the latter's goods may be attached.**

The death of a defendant does not of itself dissolve the lien of an attachment.<sup>150</sup> By statute, however, in many states, the death of a defendant, and taking out administration of his estate, effects a dissolution of an attachment of his property. Thus, in Massachusetts, it is provided that the death of the owner of the goods, and administration taken on his estate within a year, or applied for within a year and taken afterwards, dissolves an attachment of his property, either by ordinary process of attachment or by trustee process.<sup>151</sup>

<sup>148</sup> *Id.*

<sup>149</sup> *Newcomb v. Goss*, 1 Metc. (Mass.) 333; *Clark v. May*, 11 Mass. 233.

<sup>150</sup> *Mitchell v. Schoonover*, 17 Pac. 867, 16 Or. 211.

<sup>151</sup> Mass. Pub. St. c. 161, § 56; *Parsons v. Merrill*, 5 Metc. 356; *Wilmarth v. Richmond*, 11 Cush. 463; *Day v. Lamb*, 6 Gray, 523; post, p. 495, as to trustee process.

*Liability of Goods of the Deceased to Attachment.*

If an attachment put upon the goods of a person during his life is not dissolved by his death, the goods held under the attachment may be taken on execution within the proper time.<sup>152</sup> If the attachment is dissolved by the death of the owner of the property and taking administration, the property belongs to the executor or administrator in his representative capacity, free from the lien of attachment; but, if the owner made a valid conveyance before his death, subject to the attachment, the property on dissolution of the attachment as above stated belongs to the person to whom the conveyance was made, and should be turned over to him when the lien has been so dissolved.<sup>153</sup>

*Attachments—Service of Writ.*

If the cause of action is for a debt due by the deceased, there can be no attachment of the goods of the executor or administrator, or taking of his body, and the writ must be framed for an attachment of the goods of the deceased in the hands of the executor or administrator, and a summons to him to appear in court.<sup>154</sup> If there are several executors or administrators named as defendants, the writ must be served on all.<sup>155</sup> If the writ is made out against the defendant personally, and his estate is attached, an amendment may be allowed, by which the defendant is charged in his representative capacity, but only on discharging the attachment and such terms as to costs as the court thinks fit.<sup>156</sup>

<sup>152</sup> *Grosvenor v. Gold*, 9 Mass. 209, 213; *Jewett v. Smith*, 12 Mass. 308; Mass. Pub. St. c. 161, § 56. See *supra*, p. 493.

<sup>153</sup> *Coverdale v. Aldrich*, 19 Pick. (Mass.) 391.

<sup>154</sup> Mass. Pub. St. c. 166, § 5; *Cooke v. Gibbs*, 3 Mass. 197; *Quigg v. Kittredge*, 18 N. H. 137. See *post*, p. 495.

<sup>155</sup> *Owen v. Brown*, 2 Ala. 126; *Jones' Ex'rs v. Wilkinson*, 3 Stew. (Ala.) 44; *Barnes v. Jarnagin*, 12 Smedes & M. 108; *Wynn v. Booker*, 26 Ga. 553; *Tappan v. Bruen*, 5 Mass. 196. Cf., as to joint executors and administrators, *ante*, p. 180, c. 11.

<sup>156</sup> *Lester v. Lester*, 8 Gray (Mass.) 437.

## TRUSTEE PROCESS.

209. Trustee process upon goods, effects, and credits of the deceased cannot be begun after his death.
210. Trustee process may be begun after his death in a suit against the executor or administrator personally upon moneys or credits due the latter from third persons, though the claim or demand trustee'd accrued to the executor or administrator in process of settling the estate, and as part of the assets.
211. An executor or administrator is not liable to trustee process at common law for a legacy or distributive share of the estate, at suit of a creditor of the legatee or distributee, nor for a debt due by the estate, in a suit by a creditor of the creditor of the estate, but may be made so liable by statute.
212. In many states, by statute, a debt, legacy, or distributive share of an estate, while in the hands of the executor or administrator, may be trustee'd by a creditor of the creditor, by a legatee, or by a distributee.

The liability of an executor or administrator under trustee process or foreign attachment is largely a matter of statutory regulation, and for the details of the proceedings by which such liability is enforced reference must be had to the statutes of the various states. At common law, or rather by the custom of the city of London, a plaintiff, creditor of the deceased, might attach goods or money of the deceased in the hands of another in the city, in a suit against the executor or administrator, on a demand against the deceased,<sup>157</sup> but not on any other demand.<sup>158</sup> It was also the law on this custom that no debt due to the estate, or goods belonging to it, could be held by foreign attachment, unless the debt was due to the deceased, or unless the goods belonged

<sup>157</sup> *Masters v. Lewis*, 1 Ld. Raym. 57; *Fisher v. Lane*, 3 Wils. 297.

<sup>158</sup> Com. Dig. "Attachment," D.

to him. Thus, if an executor or administrator took a bond to himself for a debt due to the deceased, the money payable on the bond could not be attached;<sup>159</sup> nor, if money was awarded to an executor or administrator on a submission by him of a controversy between the deceased and another person.<sup>160</sup> But in the United States no trustee process can be put in after the death of the deceased, and a debt due to the deceased, or goods belonging to him in the hands of a stranger, cannot be attached by trustee process in a suit begun after his death, by a creditor of the estate, against the executors or administrators, since the collection of the debts of the estate and of the goods belonging to it is entirely in the power of the executor or administrator, unless a statute exists giving such power of attachment, or the custom of the city of London has been adopted by decision of the courts.<sup>161</sup> If, however, the executor or administrator has entered into any contract in regard to the estate by which money is due to him, although the money may belong to the estate, and would be assets when it is received, yet the debt may be attached by trustee process in a suit against the executor or administrator personally, on a demand due by him personally, and having nothing to do with the estate. Thus, where the executrix took from one who was indebted to the testator a promissory note in the following form: "For value received, I promise to pay Catherine Ansart, executrix of the last will and testament of Lewis Ansart, Esq., deceased, one hundred and eighty-seven dollars and seventy-six cents, in ninety days from the above date. [Signed] Moses B. Coburn,"—and the executrix gave the note to her attorney for collection, and he collected the amount with interest, and a personal creditor of the executrix then sued her on a demand against her personally, and trusted the attorney for the sum so collected by him, it was held that the attorney owed the money to Mrs. Ansart, although it would be assets of the estate when she received it, and she would be obliged to account for it; and the trustee was held.<sup>162</sup>

<sup>159</sup> *Horsam v. Turget*, 1 Vent. 113.

<sup>160</sup> *Horsam v. Turget*, 1 Vent. 112.

<sup>161</sup> See *Brooks v. Cook*, 8 Mass. 246; *Lyons v. Houston*, 2 Har. (Del.) 349; *Reynolds v. Howell* (Del. Err. & App.) 31 Atl. 875.

<sup>162</sup> *Coburn v. Ansart*, 3 Mass. 319.

*Liability of Executors or Administrators as Trustees for Debts, Legacies, and Distributive Shares.*

As to the liability of executors or administrators themselves as trustees, in the absence of statutory provisions on this subject, in the process of foreign attachment, for debts owed by the estate, or for legacies or distributive shares, it has been held that at common law an administrator is not liable to such attachment on a debt due by the estate in an action by a third person against a creditor of the estate, because the administrator is a quasi public officer, deriving his authority from law, and obliged to execute it according to law.<sup>163</sup> The same decision would probably be made in the United States, in default of statutory authority, in regard to an attempt to hold an executor for a debt due by the estate in a suit by a third person against a creditor of the estate. The reason of such a decision is more probably the inconsistency of such a proceeding with the whole scheme of administration as to collecting debts of the estate and paying the liabilities thereof, rather than the public or official character of the executor or administrator. As to legacies and distributive shares of estates, it was held at common law that a general legacy could not be so attached in a suit against the legatee, because the rights of creditors could not be determined in such a proceeding, and without such determination it was uncertain whether the legacy would be payable.<sup>164</sup> And in an early case in Massachusetts the same decision was reached under a statute allowing "goods, effects, and credits of the defendant intrusted to or deposited with" a stranger to be so attached, the court holding that a legacy could not be called "goods or effects," nor, in any proper sense, a "credit," since that word involves the relation of debtor and creditor, even though in that state payment of the legacy could be enforced by suit at law against the executor.<sup>165</sup> Similar reasons would prevent an administrator from being liable to trustee process in regard to a distributive share, and it is generally held that an executor or administrator is not liable, as such, to trustee process in regard to

<sup>163</sup> Brooks v. Cook, 8 Mass. 246.

<sup>164</sup> Wood v. Smith, Noy, 115.

<sup>165</sup> Barnes v. Treat, 7 Mass. 271.

a debt, legacy, or distributive share, unless a statute expressly creates that liability.<sup>166</sup>

*Same—Statutes as to Trustee Process.*

By statutes in many states, debts, legacies, distributive shares, goods, effects, or credits due from or in the hands of an executor or administrator as such, may be attached in his hands by trustee process by a creditor of the creditor, legatee, or distributee. Under such statutes it is held that a distributive share of the estate may be attached by trustee process before a decree of distribution has been passed by the probate court. The court says: "It is objected on the part of the trustee that he cannot be adjudged as such, because the credits and effects of the deceased in his hands are not absolute, but contingent and uncertain. No difficulty can arise from any uncertainty as to the person to whom the distributive share is to be assigned in the decree of distribution; that subject having been recently considered in the case of *Hayward v. Hayward*,<sup>167</sup> where it was held that the distributive share vests immediately on the death of the intestate in the person then heir at law. The objection, if any, arises from the entire uncertainty of the amount of assets until after a settlement of the account of administration, and a decree of the judge of probate apportioning the estate among the heirs at law;" and the court decides that this uncertainty may be obviated by continuing the case until the estate has been settled, and a decree of distribution had, and that the lien of attachment begins at the time of service of this writ, and lasts till after the decree of distribution.<sup>168</sup> The interest in a legacy which is liable to attachment by trustee process must be a vested interest, and not an uncertain or contingent one. If the interest is not vested, there can be no attachment.<sup>169</sup> A decision illustrative of this point was reached in the case of *Carson v. Carson*,<sup>170</sup> in which the fact was that the legacy was the income of the

<sup>166</sup> *Thorn v. Woodruff*, 5 Ark. 55; *Winchell v. Allen*, 1 Conn. 385; *Lyons v. Houston*, 2 Har. (Del.) 349; *Curling v. Hyde*, 10 Mo. 374; *Welch v. Gurley*, 2 Hayw. (N. C.) 334.

<sup>167</sup> 20 Pick. (Mass.) 517.

<sup>168</sup> *Wheeler v. Bowen*, 20 Pick (Mass.) 564.

<sup>169</sup> *Rich v. Waters*, 22 Pick. (Mass.) 563.

<sup>170</sup> 6 Allen (Mass.) 397.

estate to the widow for her life, and no disposition was made of the remainder after her death, and the court refused to hold the executor in trustee process against one of the heirs at law. If there are not sufficient assets in the personal estate to pay the legacy so attached, the court will continue the case in order to allow the executor to obtain license to sell real estate to pay the legacy, subject, of course, to the payment of the debts of the estate.<sup>171</sup>

The statute relating to trustee process does not apply to a specific legacy of goods of the deceased which are not in the possession of the executor at the time of the attachment. Thus, when the legacy was of an undivided fractional interest in a vessel, which was not, and never had been, in the possession of the executor, it was held that, as the legatee was entitled only to that specific thing, and that specific thing was not in the possession of the executor, the executor could not be held liable as trustee.<sup>172</sup> The result would be different in regard to a general pecuniary or residuary legacy, because the interest of the legatee would be in whatever of the property was not used to pay debts, and therefore he has an interest in the goods of the estate in the hands of the executor, although the amount may not be ascertained until the estate is settled; for which purpose the court will, as above stated, continue the trustee process to await the result of the administration proceedings.

As to the liability of an executor or administrator as trustee of a devisee or heir at law as to land, there is no liability ordinarily, because the title to the land vests in the devisee or heir at law. It is, however, subject to be taken and sold by the executor or administrator for the payment of debts, and if it is sold, and a surplus remains, this surplus might be attached, but only by serving the writ after the proceeds have come into the hands of the executor or administrator. Before that time he has nothing which belongs to the devisee or heir, but after that time he has property which may turn out to belong to the heir or devisee if it is more than sufficient to pay the debts. It seems, therefore, that a trust-

<sup>171</sup> *Cady v. Comey*, 10 Metc. (Mass.) 459. Cf. ante, p. 280, c. 16, as to sales of real estate to pay debts.

<sup>172</sup> *Nickerson v. Chase*, 122 Mass. 296.

tee writ served at any time after such proceeds of the sale have come into the hands of the executor, and before he has paid the surplus, if any, over to the heir or devisee, would hold him as trustee.<sup>173</sup>

*Same—Nature of the Liability.*

An executor or administrator does not begin to be liable to trustee process under such a statute until after he has fully qualified for office, which is generally after he has been appointed by the court and given bond.<sup>174</sup> If there are several successive attachments of the debt, legacy, or distributive share, the executor or administrator must satisfy them in the order of priority to the extent that the debt, legacy, or distributive share suffices.<sup>175</sup> Such an attachment is good only to the amount which becomes payable by the estate; that is, if the estate is insolvent, to the amount of the dividend declared.<sup>176</sup> But in a suit against a legatee it includes the proceeds of real estate sold to pay debts or legacies, as well as the personal assets.<sup>177</sup> When an executor or administrator is thus trusteesd, he may set off against the debt, legacy, or distributive share any debt due by the creditor, legatee, or distributee to the estate; and, if this equals the amount of the debt, legacy, or distributive share, the executor or administrator will be discharged.<sup>178</sup> A case arising on peculiar facts was that of *Green v. Nelson*,<sup>179</sup> in which a legacy was given to A., and the residue to B., on condition of his paying the debts and legacies of the estate. B. was also appointed executor. He declined to act as executor, but accepted the residuary legacy on the condition on which it was given. Suit was brought against A. by a personal creditor of his, and B. was trusteesd as owing the legacy to A., not as executor, but on account of having accepted the residuary legacy on such condition. B. defended on the ground that A. was indebted to the

<sup>173</sup> *Capen v. Duggan*, 136 Mass. 501.

<sup>174</sup> *Davis v. Davis*, 2 Cush. (Mass.) 114. See *Capen v. Duggan*, *supra*.

<sup>175</sup> *President, etc., of Boston Bank v. Minot*, 3 Metc. (Mass.) 507.

<sup>176</sup> *Id.*

<sup>177</sup> *Cady v. Comey*, 10 Metc. (Mass.) 461.

<sup>178</sup> *Nickerson v. Chase*, 122 Mass. 297. Cf., as to set-off, ante, p. 354, c. 18, and post, p. 541, c. 24.

<sup>179</sup> 12 Metc. (Mass.) 567.



testator to a sum equal to the legacy to him, and that these debts might be set off against the legacy by B. The court agreed to this, holding that the trustee was entitled to every legal and every equitable set-off in his own right or in the right of those with whom he is privy.<sup>180</sup> This right of set-off is subject to this qualification; that in the case of a legatee whose legacy is attached in the hands of the executor, if the legatee owes the estate, the executor cannot retain enough of the legacy to pay these debts, if the legacy operates as a discharge of the debt. The legacy itself is not presumed to be in satisfaction of the debt, but there must be circumstances or expressions in the will which show that the testator intended to discharge the debt and to have the legacy operate in that way.<sup>181</sup> In those states where the rights of husband and wife remain as at common law, the husband's right to the wife's credit, legacy, or distributive share, before he has reduced it to possession, may be attached by trustee process.<sup>182</sup> If the husband dies before having reduced the chose in action to possession, the right dies with him, and the credit, legacy, or distributive share survives to the wife, even if it has been attached by trustee process during the life of the husband, by a creditor of his; for the attachment creates a lien only on the credit, legacy, or share, and does not divest the wife's right of survivorship in event of the death of the husband.<sup>183</sup> But under the modern statutes, as to the power of married women to hold property in their own right, the husband has no right to his wife's credit, legacy, or share which can be attached.<sup>184</sup>

If the executor wrongfully pays the legacy under attachment to the legatee, before he has ascertained whether there are assets enough to pay debts, he makes himself liable personally to pay the

<sup>180</sup> *Hathaway v. Russell*, 16 Mass. 473; *Allen v. Hall*, 5 Metc. (Mass.) 266.

<sup>181</sup> *Smith v. Chandler*, 1 Gray (Mass.) 526. See post, p. 541, c. 24, and ante, p. 354, c. 18,

<sup>182</sup> *Wheeler v. Bowen*, 20 Pick. (Mass.) 563. See ante, c. 18, as to legacies, and *Id.* p. 400, c. 19, as to distributive shares.

<sup>183</sup> *Strong v. Smith*, 1 Metc. (Mass.) 476. Cf. ante, p. 366, c. 18, and *Id.* p. 373, c. 19.

<sup>184</sup> See *Chick v. Agnew*, 111 Mass. 266.

legacy, and there is no necessity of continuing the case to ascertain whether the legacy will ultimately be payable, or whether the debts of the estate will exceed the assets.<sup>185</sup> The executor cannot be trusted if the principal debtor is not the legatee, but the heir at law of the legatee; for the legacy is not due to such heir at law, but administration must be had on the legatee's estate. And in such case the executor must pay the legacy to the executor or administrator of the legatee, and is not held by the attachment in a suit against the heir of the legatee.<sup>186</sup> If the administrator has before attachment paid over to the distributee money belonging to the estate which equals the amount of his share of the estate, the distributee has no claim on the estate, and the attachment holds nothing.<sup>187</sup>

A question arose in one case whether the statute which provides that the attachment shall be dissolved by the death of the defendant and the grant of administration was affected by a statute which provided that an attachment might be continued after the defendant goes into insolvency, if such continuance is for the benefit of creditors. In that case there were four mortgages, the last of which was alleged by the assignee in insolvency to be in fraud of creditors. The attachment was made prior to the recording of the fourth mortgage, and was ordered to be continued in force for the benefit of creditors generally. The debtor then died, and the assignees contended that the order superseded the statute relating to the dissolution of attachments by the death of the defendant; but the court held that the order related only to the provision of the statute in relation to insolvency, by which the attachment is ordinarily dissolved by the issuing of the warrant in insolvency.<sup>188</sup>

The statutory process of equitable attachment by which, in some states, property of the debtor which cannot be come at to be attached or taken on execution at law may be reached by bill in equity, does not apply in those states in which the legacy may be attached

<sup>185</sup> *Hoar v. Marshall*, 2 Gray (Mass.) 253. As to protecting himself by a refunding bond, see ante, p. 358, c. 18.

<sup>186</sup> *Stills v. Harmon*, 7 Cush. (Mass.) 406.

<sup>187</sup> *Henshaw v. Whitney*, 11 Gray (Mass.) 223.

<sup>188</sup> *Day v. Lamb*, 6 Gray (Mass.) 523.

in the hands of the executor, because in such states the plaintiff has a plain, adequate, and complete remedy at law.<sup>189</sup>

*Proceedings in Execution against Trustee.*

If a trustee dies while the suit is pending, but before judgment, his executor or administrator is generally liable to the same process to compel him to undertake the defense of the trustee's position as is provided by statute in case of the death of a principal defendant, and the suit then proceeds as if the executor or administrator had been originally summoned.<sup>190</sup>

SUITS IN EQUITY.

213. Any suit in equity which might have been brought against the deceased may be brought against his executors or administrators. Equitable suits may arise in course of settling the estate.

214. General administration suits in equity are recognized in the federal courts when the parties are citizens of different states. Such suits are recognized in a few states where the powers of the probate courts are limited or insufficient, but in most states no suit in equity will lie for a general accounting and administration of the estate, nor to compel the payment of a debt, legacy, or distributive share of the estate, until after the debt, legacy, or distributive share has been decreed payable by the probate court, and then only when the plaintiff is not entitled to sue at law for the payment of the debt, legacy, or distributive share.

215. In suits in equity for an account and distribution, equity will marshal the assets of the estate so as to secure equality in the distribution of the burden of paying debts among all the kinds of assets.

<sup>189</sup> Vantine v. Morse, 104 Mass. 275.

<sup>190</sup> Patterson v. Patten, 15 Mass. 473. Cf. ante, p. 489.

The liabilities of an executor or administrator in equity may be divided into those which existed against the deceased in his lifetime and which are, after his death, cast upon the executor or administrator by virtue of his office, and those which arise after the death of the testator or intestate, and are enforceable against the executor or administrator personally. As to the first of these, the executor or administrator is liable, as such, to all the equitable demands which were enforceable against the deceased.<sup>191</sup> As to the second, many equitable liabilities may be incurred by an executor or administrator in the course of settling an estate; but they arise from contracts or acts of the executor or administrator in administering the estate, just as equitable liabilities are incurred in the transaction of ordinary business, and need not be further referred to than has already been done incidentally to the discussion of the duties of administration.<sup>192</sup> The most important point to be noticed as to proceedings in equity against executors and administrators is the process by which the whole settlement of the estate may, in a few jurisdictions, be taken from the probate court, and assumed by a court of equity. This transference arose in England from the inability of the ecclesiastical courts to carry out their decrees and to enforce the proper administration of the estate; and the jurisdiction in equity thus assumed was strengthened by the fact that for almost all purposes executors or administrators are considered trustees of the estate which they are administering. In the United States this equitable jurisdiction is rendered in some states unnecessary by the increased efficiency of the decrees and orders of the probate court, supplemented by the power of those interested in the performance of any decree to sue on the probate bond in case the decree is disobeyed,<sup>193</sup> and the court of equity will not take jurisdiction.<sup>194</sup> In other states, however, the equity jurisdiction exists, and is held to be not affected by the probate court jurisdiction, to which it is supplementary and

<sup>191</sup> *Toller, Ex'rs*, 479; *Williams, Ex'rs*, 2005; *Hohorst v. Howard*, 37 Fed. 97.

<sup>192</sup> See chapter 15.

<sup>193</sup> *Wilson v. Leishman*, 12 Metc. (Mass.) 316; *Morgan v. Rotch*, 97 Mass. 396; *Walker v. Cheever*, 35 N. H. 345; *Story, Eq. Jur.* § 533.

<sup>194</sup> See post, p. 518.

superior.<sup>195</sup> This question turns upon the provisions of the statutes in each state. But no state statute can defeat or impair the general equity jurisdiction of the circuit court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction.<sup>196</sup> The effect of these last two decisions cited is, if sustained, very far-reaching, for under them the federal court may apparently interfere, in its equity jurisdiction, with all the probate practice of any state in cases where the parties are citizens of different states. But in all such cases the federal courts will observe the administration laws of the state, which are not merely rules of practice for the courts, but laws limiting the rights of parties.<sup>197</sup>

### *Creditors' Bills.*

The most ordinary form in which this jurisdiction is asserted is in what is called a "creditors' bill." Such a bill may be brought by a creditor in behalf of himself and all other creditors who may choose to come into the proceedings for an account of the assets and a due settlement of the estate. This suit includes all claims of all creditors who prove their demands in the case; and if, on taking account of the assets of the estate, there appears to be sufficient to pay the debt of the creditor who files the bill, a decree for such payment is made, and the court, having taken jurisdiction of the case for that purpose, follows it out by decreeing the payment of all other claims proved against the estate in the suit.<sup>198</sup> But this decree of payment of the various claims filed in the suit ought not to have a prejudicial effect upon creditors who have not proved their claims in the suit, and who are therefore in no way parties to it, and have not been guilty of any laches; and to obviate this injustice it has been established as the rule in England that, while payments under this decree exonerate the executor or

<sup>195</sup> *Frey v. Demarest*, 16 N. J. Eq. 236; *Coddington v. Bispham's Ex'rs*, 36 N. J. Eq. 224, 574; *Houston v. Levy's Ex'r*, 13 Atl. 671, 44 N. J. Eq. 6.

<sup>196</sup> *Hayes v. Pratt*, 13 Sup. Ct. 503, 147 U. S. 557; *Lawrence v. Nelson*, 12 Sup. Ct. 440, 143 U. S. 215. Cf. *ante*, p. 504.

<sup>197</sup> *Rio Grande R. Co. v. Gomila*, 10 Sup. Ct. 155, 132 U. S. 478; *Yonley v. Lavender*, 21 Wall. 276, 279, 280.

<sup>198</sup> *Williams, Ex'rs*, 2007; *Whitmore v. Oxborrow*, 2 Younge & C. 13; *Woodgate v. Field*, 2 Hare, 211; *Story, Eq. Jur.* § 547.

administrator from liability for such payments, yet the other creditors may have suits against those persons who have received such payments for contribution to pay their claims.<sup>199</sup> But in many of the United States the probate court orders public notice to be given to all creditors to prove their claims within a limited time, and after such time has elapsed the claims will be barred.<sup>200</sup>

Until the decree in such a suit by a creditor, every creditor who joins it has what is called an inchoate right in the suit. Yet the creditor who begins the suit is considered to be the *dominus litis*, and may conduct the suit as he pleases; and, if the executor pays him his debt and costs, the creditor may discontinue the suit, thus leaving the other creditors to pursue their own remedies.<sup>201</sup> For this reason it is the practice to allow other creditors to institute similar suits while the first suit is still pending, and to pursue all concurrently until a decree in one is reached, which stays the proceedings in all others in which no further or different relief is sought.<sup>202</sup> The decree in such a case is that the executor or administrator account before a master in chancery for the assets and the debts of the estate. This proceeding is begun by a notice, which has been previously alluded to,<sup>203</sup> by which all creditors are summoned into the proceedings to prove their debts, or be barred from proving their claims in any other suit, or at any other time.<sup>204</sup> In this accounting each creditor may contest the claims of any other creditor, and the whole question of the debts of the estate is fully gone into.<sup>205</sup> Until the decree of account is passed, it is possible, as has been seen above, for other creditors to institute other suits, which will proceed concurrently; but, after the decree of a general account is passed, the executor or administrator may have an order stopping all suits in other courts, except such as are under the direction and control of the court of equity where the decree is passed.<sup>206</sup> This order, however, is granted only

<sup>199</sup> Williams, Ex'rs, 2008; Story, Eq. Pl. § 106.

<sup>200</sup> Ante, p. 336, c. 17.

<sup>201</sup> Woodgate v. Field, 2 Hare, 211, 212.

<sup>202</sup> Id.; Williams, Ex'rs, 2012.

<sup>203</sup> Ante, p. 339, c. 17.

<sup>204</sup> Story, Eq. Jur. § 548.

<sup>205</sup> Owens v. Dickenson, 1 Craig & P. 48, 56.

<sup>206</sup> Morrice v. Bank, Cas. t. Talb. 217; Martin v. Martin, 1 Ves. Sr. 211, 212;

upon terms of the executor or administrator bringing the assets into court, or obeying such other order of the court as the circumstances of the case may require.<sup>207</sup>

In cases where the executor or administrator admits assets, or where the creditor brings the bill for the collection of his own debt, and not in behalf of the other creditors as well, the decree is not for a general accounting of the estate as payment of all debts, but for the payment of the creditor's debt only, for the other creditors are not prejudiced in such a case, as the executor or administrator, by admitting assets, renders himself liable to pay the debt. And in case of a bill by the creditor for his single debt the judgment is only for payment in due course of administration.<sup>208</sup>

*Same—Parties to Creditors' Bill.*

When such a bill as is above referred to has been brought by a creditor against the executor or administrator of the estate, there is no necessity of making any legatee or next of kin parties, for it is presumed that the executor or administrator will take care that the demands against the estate are legal ones, since it is his duty to do so; but, if any special circumstances make it proper that one or more of such persons be made parties, they may be joined as defendants.<sup>209</sup> Nor can debtors of the estate, or persons holding property belonging to the estate, be made parties to such a suit generally, since the executor or administrator is the only person who has the right to collect the estate or to compel the payment of debts due to it; but, if he has colluded with the debtor, and so refuses to collect the debt, or if he has released the debt and is insolvent, or in other cases where some obstacle exists to the executor or administrator enforcing the payment of the debt, the suit in equity may include the debtor also.<sup>210</sup> The rule has been said to be relaxed in cases of partnership, and the surviving partner has been joined with the executor or administrator in order to

*Perry v. Phelps*, 10 Ves. 38, 39; *Douglas v. Clay*, 1 Dickens, 393; *Kenyon v. Worthington*, 2 Dickens, 668.

<sup>207</sup> *Gilpin v. Southampton*, 18 Ves. 469; Story, Eq. Jur. § 549.

<sup>208</sup> *Woodgate v. Field*, 2 Hare, 211, 212; Story, Eq. Jur. §§ 546, 548a.

<sup>209</sup> *Brown v. Dowthwaite*, 1 Madd. 446; *Hertford v. Zichi*, 9 Beav. 11.

<sup>210</sup> *Newland v. Champion*, 1 Ves. Sr. 105; *Utterson v. Mair*, 2 Ves. Jr. 95; *Doran v. Simpson*, 4 Ves. 651; *Cummings v. Cummings*, 9 N. E. 730, 143 Mass. 340.

secure an account of the whole estate, without any charge of collusion.<sup>211</sup> But it is rather to be said that the real principle is that, where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors or administrators of the rights of those who are interested in the estate, then the surviving partners may be joined with the executor or administrator as parties.<sup>212</sup>

### *Bills by Legatees.*

The same process in equity is also applied to enforce the payment of a general or pecuniary legacy or a distributive share. As the right of a general legatee to compel payment of the legacy depends upon the existence of sufficient assets of the estate to allow the executor to pay all debts, it is evident that this right can only be properly asserted in equity, where the court can take an account of the whole estate, and decide whether it is the duty of the executor to pay the legacy or not. Accordingly it is the practice for a legatee in England to file a bill in equity to enforce the payment of his legacy, and he may file this bill in behalf of all other legatees as well as himself. And, if the assets are sufficient, the court will make a decree of payment of legacies due to all legatees who have come in and become parties to the suit.<sup>213</sup> The same remarks apply to legatees who do not join the suit as were made in regard to creditors similarly situated; that is, they are not concluded by the suit except as to the executor, but they may proceed against the creditors or legatees who have received portions of the estate in pursuance of the decree.<sup>214</sup>

### *Limited Equitable Jurisdiction.*

The foregoing remarks about the jurisdiction in equity have been applicable to those jurisdictions where the subject remains, as in England, at common law. In some of the United States this is the law, and administration suits in equity may be brought by creditors or legatees or distributees.<sup>215</sup> In most states, however, all juris-

<sup>211</sup> *Bowsher v. Watkins*, 1 Russ. & M. 277.

<sup>212</sup> *Travis v. Milne*, 9 Hare, 141, 150; *Stanton v. Carron Co.*, 18 Beav. 146.

<sup>213</sup> *Mitt. Pl.* (4th Ed.) 169; *Williams, Ex'rs*, 2007.

<sup>214</sup> *Williams, Ex'rs*, 2007, 2008. See, as to legacies, ante, p. 360, c. 18, as to distributive shares, ante, p. 398, c. 19.

<sup>215</sup> *Simmons v. Tongue*, 3 Bland (Md.) 341; *High's Adm'r v. Worley's Adm'r*,



diction as to accounting by an executor or administrator is vested exclusively in the court of probate, which is given full powers and processes to compel an account and to insure the fullness and accuracy thereof; and a debt, legacy, or distributive share may be recovered in an action at law or by an action upon the probate bond; and therefore, between the probate court and the common-law actions for the debt, legacy, or distributive share, there is no necessity for any equitable jurisdiction. Thus, in one case, a bill in equity was brought by one entitled to a distributive share of an estate to compel the administrator, who had settled his accounts in the probate court, to inventory and account for certain bonds belonging to the estate which he had failed to include in his inventory filed in the probate court, or in his accounts. The complainant had assented to the administrator's accounts, and had received a share of the estate, but with the express understanding that the assent and receipt should not prejudice her rights to the bonds. The bill prayed that the defendant be ordered to account for these bonds as a part of the estate of the deceased, or, as an alternative, that the defendant be ordered to pay the plaintiff the sum found due as her share of the bonds. The court held that the bill was an attempt to transfer the settlement of the accounts of the defendant to the court of equity from the probate court, which had ample jurisdiction to redress the matters complained of as to the accounting, and that the bill rested upon an alleged failure of the defendant to perform his duties as administrator, and that the court of equity was not the proper tribunal for that inquiry.<sup>216</sup> And the rule is laid down to be that there is no remedy in equity as long as there is a plain, adequate, and complete remedy at law,<sup>217</sup> which practically amounts to all ordinary cases under the decisions, since these courts hold that the remedy on the probate bond, or by removal of executor or administrator on his failure to account, is a plain, adequate, and complete remedy for the enforcement of rights against an executor. In a proper case, the court of equity, having all the parties and the fund before it, on a bill

32 Ala. 709; *Walker v. Morris*, 14 Ga. 323; *Vansyckle v. Richardson*, 13 Ill. 171; *Freeland v. Dazey*, 25 Ill. 294.

<sup>216</sup> *Foster v. Foster*, 134 Mass. 120.

<sup>217</sup> *Morgan v. Rotch*, 97 Mass. 396; *Wilson v. Leishman*, 12 Metc. (Mass.) 316.

to ascertain the construction of a will and the operation of the statutes of descent, may proceed to the final distribution of the estate, and payment made by the executor under its decree will exonerate him from further liability.<sup>218</sup> In one case a bill was brought by one who claimed as equitable assignee of one who was entitled to legacies and distributive shares in three estates. The assignment was made to the plaintiff as security for a debt. The bill prayed that the assignment might be declared valid; that certain other similar assignments, subsequent in date, might be declared invalid as against the plaintiff; that an account of the sums due to the assignor from the several estates be taken; that the various administrators and executors be enjoined from paying over the amounts so due to any of the legatees or distributees or persons otherwise entitled to them, and be ordered to pay them to the plaintiff; and for further relief. The court held that, as far as accounts in the various estates were concerned, the bill did not ask for the removal of the accounting from the probate court, which could not be done, but that the principal object of the bill was to obtain a construction and declaration of the validity of the assignment; and that, as the probate court did not take cognizance of assignments by legatees or distributees of their interests in estates, but dealt only with those immediately entitled, the bill might be maintained for the object stated above; and that the plaintiff was entitled to the injunction restraining the executors and administrators from paying over the amounts to which the plaintiff might be equitably entitled to any other person; and that the bill should be retained until the probate courts had by decree settled the amounts due to the assignor in the various estates, and then an order should be made in the suit in equity, compelling the executors and administrators to pay over to the complainant the amount due to her to satisfy her claim.<sup>219</sup> This case and the others above cited show that in most states the whole subject of accounting is left to the probate court exclusively, and that, until a final decree, the executor or administrator is to proceed wholly in that court; but that, after a decree is rendered settling the

<sup>218</sup> *Daboll v. Field*, 9 R. I. 266, 285, 286.

<sup>219</sup> *Lenz v. Prescott*, 11 N. E. 923, 144 Mass. 505.

amount due to legatees and distributees, the court of equity will take jurisdiction to enforce the proper payment of the legacies or distributive shares in cases where the proceedings at law or on the probate bond would not afford a plain, adequate, and complete remedy,—one of such cases arising when an equitable assignment has been made. These remarks should be understood as not excluding the remedies of legatees for their legacies at law, or proceedings by creditors for their debt in due course<sup>1</sup> of administration. But it may be said that, where the probate court has full powers to settle estates, creditors' bills and equitable administration suits, such as exist in England and other states where the probate court has a less complete jurisdiction, are not recognized.<sup>220</sup>

### *Equitable Assets.*

The proceedings upon a creditors' bill for general administration render a consideration necessary of the two subjects of equitable assets and of marshaling the assets. Equitable assets are contradistinguished from legal assets, and are of two kinds: those portions of the property of the deceased which would not by law be liable to be applied to the payment of debts or legacies, but which the deceased has himself made liable; and those portions of the same property not liable in law for such purposes, but which a court of equity renders so liable from the nature of the estate. In regard to the former, the principal species is land which the testator has devised to be sold for the payment of debts. This devise is considered by a court of equity to make the land a part of the fund for such purposes, and it is therefore called equitable assets of the estate, although at common law such an obligation did not exist upon the land.<sup>221</sup> As to the latter species of equitable assets, any equitable estate which is chargeable with debts is, from its nature, equitable assets, because it exists and can be

<sup>220</sup> *Jennison v. Hapgood*, 7 Pick. (Mass.) 1; *Sever v. Russell*, 4 Cush. (Mass.) 513; *Grinnell v. Baxter*, 17 Pick. (Mass.) 383; *Wilson v. Leishman*, 12 Metc. (Mass.) 316; *Morgan v. Rotch*, 97 Mass. 396. As to legacies, see ante, p. 363, c. 18. As to distributive shares, see ante, p. 400, c. 19.

<sup>221</sup> *Lewin v. Okeley*, 2 Atk. 50; *Newton v. Bennet*, 1 Brown, Ch. 135; *Dixon v. Ramsay*, Fed. Cas. No. 3,933, 1 Cranch, C. C. 496; *Story, Eq. Jur.* § 552; *Speed's Ex'r v. Nelson's Ex'r*, 8 B. Mon. (Ky.) 499. As to statutory right of sale to pay debts in the states, see ante, p. 280, c. 16.

treated only by a court of equity.<sup>222</sup> In many of the United States the land of the deceased is made liable by statute to the payment of his debts, and is, therefore, legal assets of the estate; and the general subject of assets is frequently regulated by statutes which vary the effect of the common law.

In such a suit in equity as has been already referred to,—that is, a creditors' bill for an account and administration,—and in all other suits where a court of equity takes an account of all assets for distribution, equitable assets are included with the others; but the court of equity follows the rules of law with regard to all legal assets as to priority of claims of preferred debts, and also preserves and enforces all liens, claims, and charges in rem, whether legal or equitable, as to all assets, legal and equitable;<sup>223</sup> but in regard to equitable assets it follows the principle, which has been largely adopted by statute in the United States, of considering all debts as of equal rank, and to be paid in full or proportionately, according to the amount of assets.<sup>224</sup> The peculiar methods of equity come into play when the assets consist partly of legal assets and partly of equitable assets. In such a case the court will not take away any legal preferences which creditors may have as to legal assets, but it takes account of such preferences in marshaling the debts; and, if the creditor has secured a partial payment of his debt out of the legal assets by means of such preference, the court will oblige him to allow all common creditors to take out of the equitable assets enough to give them the same proportion of their debt that the preferred creditor has taken out of the legal assets.<sup>225</sup>

### *Marshaling Assets.*

The phrase "marshaling the assets" in equity means the arranging of the different funds under the administration, so as to en-

<sup>222</sup> 2 Fonbl. Eq. bk. 4, pt. 2, c. 2, § 1, note q; *Law v. Law*, Fed. Cas. No. 8,128, 3 Cranch, C. C. 324.

<sup>223</sup> 2 Fonbl. Eq. bk. 2, pt. 2, c. 2, §§ 1, 2; *Morrice v. Bank*, Cas. t. Talb. 220, 221; *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 119; *Averill v. Loucks*, 6 Barb. (N. Y.) 470.

<sup>224</sup> Co. Litt. 24; *Cox's Creditors*, 3 P. Wms. 343, 344. As to priorities of debts in the United States, see ante, p. 322, c. 17.

<sup>225</sup> *Sheppard v. Kent*, 2 Vern. 435; *Haslewood v. Pope*, 3 P. Wms. 323; *Wilder v. Keeler*, 3 Paige (N. Y.) 167.

able all the parties having claims thereon to receive their due proportions, notwithstanding any, intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds. Thus, where there exists two or more funds, and there are several claimants against them, and at law one of the parties may resort to either fund for satisfaction, but the others can come upon one only, then courts of equity exercise the authority to marshal the funds, and by this means enable the parties whose remedy at law is confined to one fund only to receive due satisfaction.<sup>226</sup> This principle arises from the fact that the party who might resort to both funds has it in his power to balk the other creditor in cases where the fund to which both creditors may resort is not large enough to satisfy both claims.<sup>227</sup> The principle is stated to be that "a person having resort to two funds shall not, by his choice, disappoint another having resort to one only."<sup>228</sup> The application of this principle must, of course, vary with the circumstances of each case. Thus, if a creditor by a specialty, having a lien thereby on the real estate, receives satisfaction of his debt out of the personal assets, equity will allow a simple contract creditor to be subrogated to the place of the specialty creditor against the real estate to the extent to which the specialty creditor has withdrawn personal assets in satisfaction of his debt.<sup>229</sup> But if the specialty creditor, having the right to resort to two funds, has not yet taken satisfaction out of either, a court of equity will compel the specialty creditor either to take his satisfaction out of the fund which other creditors cannot resort to, or will allow him to take his satisfaction out of the common fund, and subrogate common creditors to his rights against the special fund, so far as he has withdrawn assets from the common fund.<sup>230</sup>

<sup>226</sup> 1 Madd. Ch. Prac. 499; Ram, Assets, p. 329, c. 28, § 1; Aldrich v. Cooper, 8 Ves. 388, 397; Lanoy v. Duke of Athol, 2 Atk. 446; Attorney General v. Tyndall, Amb. 614; Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409; Ramsey's Appeal, 2 Watts (Pa.) 228; Briggs v. Bank, 1 Freem. Ch. (Miss.) 574.

<sup>227</sup> Story, Eq. Jur. § 558.

<sup>228</sup> Trimmer v. Bayne, 9 Ves. 209, 211; Webb v. Smith, 30 Ch. Div. 192.

<sup>229</sup> Anon., 2 Ch. Cas. 4; Sagitary v. Hyde, 1 Vern. 455; Story, Eq. Jur. § 562.

<sup>230</sup> Sagitary v. Hyde, 1 Vern. 455; Pollexfen v. Moore, 3 Atk. 272; Aldrich v. Cooper, 8 Ves. 389, 394; Story, Eq. Jur. § 563.

So, if a mortgagee secures the payment of his mortgage out of the personal estate, the common creditors will, in equity, take his place as to the land mortgaged by right of subrogation,<sup>231</sup> or the common creditors may compel the heir to reimburse the personal estate the amount which has been taken from it by the mortgagee in satisfaction of his debt.<sup>232</sup> If the deceased had purchased land, and had not paid therefor at the time of his death, the vendor has a lien on the land, and also a claim against the personal estate, under the contract of sale. He is entitled to obtain the payment of the price out of either fund at law. But if he proceeds against the personal estate, and thus prevents the common creditors from getting their claims paid in full, a court of equity will substitute them in his place in regard to the real estate, giving them the benefit of his lien to the same extent as he has withdrawn personal assets from the estate to satisfy his debt.<sup>233</sup>

*Same—In Favor of Legatees.*

These principles also apply in courts of equity to the legatees under the will of the deceased as against the heirs to whom the real estate would descend; for, if a specialty creditor or mortgagee, who might have taken his debt out of the land, proceeds against the personal estate, and thus withdraws the fund from which the legatees would have been paid their legacies, it is obviously in accordance with the wishes of the testator that the legatees, who are specific objects of his bounty, should be allowed to take their legacies out of the real estate to the extent to which personal assets have been withdrawn from the estate, for the heirs are not equitably entitled to the land until all the legacies and devises of the testator have been satisfied, as well as his creditors.<sup>234</sup> But as against a devisee the legatees do not have the same rights, since the devisees and legatees are equally objects of the bounty of the testator, and one has no greater equity than the other, unless, indeed, some qualification of the legacy or devise indicates an inten-

<sup>231</sup> Aldrich v. Cooper, 8 Ves. 388, 395, 396.

<sup>232</sup> Wilson v. Fielding, 2 Vern. 763.

<sup>233</sup> Selby v. Selby, 4 Russ. 336, 340, 341; Lamport v. Beeman, 34 Barb. (N. Y.) 239.

<sup>234</sup> Herne v. Meyrick, 1 P. Wms. 201, 202; Culpepper v. Aston, 2 Ch. Cas. 117; Lutkins v. Leigh, Cas. t. Talb. 53.

tion of the testator to give one or the other a preference; as, for instance, if he devises land subject to a mortgage, this will give the legatees the right to claim their legacy out of the land if the mortgage debt is paid out of the personal estate, because the devisee ought to have borne the burden of the mortgage; and if by the action of the mortgagee the burden is transferred to the personal estate, to that extent the legatees may claim out of the real estate in equity in order to carry out the wishes of the testator.<sup>235</sup> The same principle gives legatees a similar right of substitution when lands are subjected by the will to the payment of debts. In such a case legatees are entitled to claim their legacies out of the lands if the personal assets are taken by creditors;<sup>236</sup> but when the testator subjects his lands to the payment of his debts, and the lands are devised, it would seem that the equity of the devisees was as good as that of the legatees, and that, if creditors resort to the personal estate, there is no reason why the real estate should be subjected to the legacies, unless the testator has indicated that the lands are to bear the debts, to the exoneration of the personal estate.<sup>237</sup>

#### ORDER OF LIABILITY OF ASSETS.

**216. The assets of a decedent are liable for the payment of his debts in the following order:**

- (a) **General personal estate, unless expressly or by implication exonerated.**
- (b) **Lands expressly devised to pay debts.**
- (c) **Estates which descend to the heir.**
- (d) **Real or personal property devised or bequeathed, charged with debts.**
- (e) **General pecuniary legacies pro rata.**

<sup>235</sup> *Clifton v. Burt*, 1 P. Wms. 679, 680; *Haslewood v. Pope*, 3 P. Wms. 322, 324; *Lutkins v. Leigh*, Cas. t. Talb. 53, 54; *Forrester v. Leigh*, Amb. 171; *Norris v. Norris*, 2 Dickens, 542.

<sup>236</sup> *Clifton v. Burt*, 1 P. Wms. 678, 679, and Cox's note.

<sup>237</sup> *Clifton v. Burt*, 1 P. Wms. 678, 679, and Cox's note; *Haslewood v. Pope*, 3 P. Wms. 323.

- (f) Specific legacies and real estate devised, whether in terms specific or residuary, are liable to contribution pro rata.
- (g) Real and personal property which the testator has power to appoint, and which he has appointed by his will or by voluntary deed.
- (h) Widow's paraphernalia.<sup>238</sup>

The mode of marshaling assets for the payment of debts depends upon the rule of the common law making the personal estate the primary fund for the payment of debts, and only exonerating it when the real estate is made solely subject to debts, or when the will shows that it is the intention of the testator that the personal property should be exonerated.<sup>239</sup> When the personal estate is insufficient for the payment of debts, the assets are marshaled in equity in the order shown in the black-letter text.

This being the order in which the assets of the estate are liable for the debts of the deceased, in equity, the principles of equity are applied in approximating the actual taking of the assets in satisfaction of debts to this order, as nearly as may be, or to such other order as the will of the testator may have directed, either expressly or by implication. Thus, if the personal estate is not sufficient for all the purposes exhibited by the will, equity will direct that it shall be used to satisfy creditors in preference to legatees, specific legatees in preference to the heir or devisee of the real estate charged with specialties or with the payment of debts.<sup>240</sup> Specific legacies are applicable to the payment of specialty debts in prior-

<sup>238</sup> Hays v. Jackson, 6 Mass. 149; Ex parte Lee, 18 Pick. (Mass.) 288; Towle v. Swasey, 106 Mass. 100, 104; McLean v. Robertson, 126 Mass. 537; Tomkins v. Colthurst, 1 Ch. Div. 626; Farquharson v. Floyer, 3 Ch. Div. 109; 2 Jarm. Wills (4th Ed.) 622; Theob. Wills (3d Ed.) 570; Harmood v. Oglander, 8 Ves. 106, 124; Livingston v. Newkirk, 3 Johns. Ch. (N. Y.) 319; Story, Eq. Jur. § 577; Alexander v. Worthington, 5 Md. 471; Whitehead v. Gibbons, 10 N. J. Eq. 230; Dunbar v. Dunbar, 3 Vt. 472.

<sup>239</sup> Trott v. Buchanan, 28 Ch. Div. 446; French v. Chichester, 2 Vern. 568, 3 Bro. Parl. Cas. 16; Williams, Ex'rs, 1205; Story, Eq. Jur. § 571; Whitehead v. Gibbons, 10 N. J. Eq. 230; M'Kay v. Green, 3 Johns. Ch. (N. Y.) 56.

<sup>240</sup> 2 Fonbl. Eq. bk. 3, c. 2, §§ 3-5, and notes e-h.



ity to real estate devised.<sup>241</sup> The devisee of mortgaged premises is able to call upon the heir at law to pay debts out of the land in preference to coming upon the mortgaged premises;<sup>242</sup> and, a fortiori, the devisee of unincumbered premises can call upon the heir to pay debts.<sup>243</sup>

The foregoing are the rules and instances applicable in equity where the personal estate is insufficient to pay all debts and legacies. If, however, the personal estate is sufficient to pay debts and legacies, then the heir at law or devisee who is compelled to pay a debt due by the deceased, or to satisfy any incumbrance, out of the land which has come to him by descent or devise, may have the debt paid out of the personal estate in preference to the residuary legatees or distributees, because the debt was primarily a charge on the personal estate, and was inequitably taken out of the real estate. Thus, if the heir or devisee pay a specialty debt or mortgage, he is entitled to have the amount repaid to him out of the personal assets, unless the testator has exempted the personal assets by express words or by clear implication.<sup>244</sup> This right of the heir, however, arises only in case the debt is primarily charged upon the personal property, as in most cases it is. If, however, the debt is one which is chargeable principally and primarily upon the land, and is not one where the land is a mere security, then the rule is reversed in equity, and the personal estate is held to be liable only as security, if at all; and, if the debt or charge is paid out of it, the real estate may be charged to make up the amount. Thus, if a jointure is to be raised out of land by the execution of a power, and there is a collateral personal covenant to raise the jointure, the jointure is considered a primary charge upon the land, and the personal covenant is collateral; and therefore the land will exonerate the personal estate.<sup>245</sup> So, when a mortgage is created by an ancestor, and the mortgaged estate descends upon the heir, who becomes personally bound to pay the

<sup>241</sup> *Cornewall v. Cornewall*, 12 Sim. 298.

<sup>242</sup> Toll. Ex'rs, bk. 3, c. 8, p. 418; *Howel v. Price*, 1 P. Wms. 294.

<sup>243</sup> *Chaplin v. Chaplin*, 3 P. Wms. 365; *Livingston v. Newkirk*, 3 Johns. Ch. 319; *Story*, Eq. Jur. § 571.

<sup>244</sup> 2 Fonbl. Eq. bk. 3, c. 2, § 1, note a.

<sup>245</sup> *Coventry v. Coventry*, 9 Mod. 13.

mortgage by covenant. There the liability of the heir is primarily a liability as regards the land only. If, therefore, he dies, his land would be charged with the mortgage, and the owner of the land could not charge the personal estate on any liability under this covenant, for that liability is collateral only, and not primary.<sup>246</sup>

#### SUITS ON PROBATE BONDS.

217. Suits on probate bonds may be divided into two classes:

- (a) Those brought by leave of the probate court, and
- (b) Those brought without such leave.

218. The former kind of suit may be brought, by leave of the probate court, by any one interested in the estate, and is in the nature of a general administration suit, the judgment being for the penalty of the bond, and there being a hearing in equity to determine the amounts due to the various persons interested in the estate, and several executions being issued to those persons for their dues.

219. The latter class of suits may be brought by two kinds of plaintiffs, creditors, and distributees; and the distinctive feature of this class is that the claim upon which suit is brought must have been definitely ascertained in amount before such suit.

The nature of the relief afforded in the probate courts to those interested in the estate has already been incidentally discussed in various places, especially in regard to the removal of executors or administrators for maladministration, the various modes of enforcing an accounting of the estate, and the ascertainment of the distributive shares. In some states the probate court has the power to make direct orders or decrees, compelling the obedience of the executor or administrator. In other states there is no inherent power in the probate court to compel an executor or admin-

<sup>246</sup> Cope v. Cope, 2 Salk, 449; Evelyn v. Evelyn, 2 P. Wms. 664, Cox's note 1; Andrews v. Bishop, 5 Allen (Mass.) 490.

istrator to pay a debt or legacy or distributive share.<sup>247</sup> In such states the probate court can indirectly enforce the proper distribution of the estate by removing the executor or administrator from office if he fails to administer properly, or by allowing suit on the bond for the damage resulting from the nonpayment of debts, legacies, or distributive shares, as will be seen later; but it has no power to enforce its orders or decrees by proceedings such as belong to the courts of equity, unless such powers are expressly given by statute. This state of things makes important the suit on the probate bond. The principal aim in suits on these administration bonds is to render the sureties liable, as the executor and administrator is liable to other simpler forms of process so far as concerns his personal liability, and the remedy against him on the bond is merely cumulative.<sup>248</sup> The executor or administrator is, however, responsible on the bond, and is generally made a party, and his conduct is always in question, as the breach of the bond must have been committed by him.

The nature of the security afforded by the probate bond is thus stated by Mr. Chief Justice Shaw, in an early case:<sup>249</sup> "A probate bond under the law of Massachusetts is a security and obligation of a peculiar character, given by an officer charged by law with a duty and trust of a various and miscellaneous character, usually given in a round sum, with condition to perform the duties of such trust. This condition, though expressed in few words, from its very generality embraces a variety of acts, to continue for a series of years, in which a great variety of persons may have interests as creditors, legatees, distributees, annuitants, wards, minors, married women, and others. It is given to the judge of probate, not in his personal, but in his official, capacity, as trustee for all persons interested; and on his decease it passes to his successors in office, not to his personal representatives. When put in suit, it must be in the name of the judge of probate. One judgment is rendered for the entire penalty; and execution may be awarded according to the circumstances of the case, and, upon particular breaches

<sup>247</sup> *Hancock v. Hubbard*, 19 Pick. (Mass.) 172, 173.

<sup>248</sup> *Loring v. Kendall*, 1 Gray (Mass.) 305, 312, 313. Cf. *Smoot's Adm'rs v. Bigstaff* (Ky.) 32 S. W. 410.

<sup>249</sup> *Loring v. Kendall*, 1 Gray (Mass.) 305, 312, 313.

averred and proved, in favor of certain individuals as judgment creditors, creditors whose debts are allowed under a commission in insolvency, and payment of a dividend decreed thereon, or distributees whose claims are ascertained by a probate decree of distribution; or in favor of the judge of probate himself, for the general benefit. In case these various awards of execution do not exhaust the whole penalty, the judgment for the residue stands as a security for any other breach which may occur at any time afterwards, to be sued for by a *scire facias* either for the benefit of a party entitled to claim in his own right, or by the judge of probate as trustee for others. The administrator himself may be subject to various suits, by action or *scire facias*; but the only liability of the surety is on the bond, and the only cause of action upon that liability is the action to be commenced and prosecuted in the name of the judge of probate."

*Actions without Leave.*

In an action on a probate bond without leave of court, if the suit is by a creditor, he must have previously obtained judgment at law for his debt, if the estate is solvent; or, if the estate is insolvent, there must have issued a decree of distribution by the probate court, directing a dividend to be paid. If the suit is by a distributee, it cannot be maintained unless the amount due to the distributee has been ascertained by a decree of distribution in the probate court.<sup>250</sup> If a creditor has not obtained judgment, and there is no decree of distribution in insolvency, he must be authorized by the judge of probate to sue; and such a suit would be a general administration suit,<sup>251</sup> in which the rights of all parties would be settled, and not only the right of the particular creditor who institutes the suit.<sup>252</sup> When the estate is administered in two states or countries, the question is whether it is in fact solvent or insolvent, which is decided by the court having the question before it by taking into account all assets and all liabilities, so far as known in both states.<sup>253</sup> If it is in fact solvent, a judgment creditor must have judgment before he can sue on the bond

<sup>250</sup> *Paine v. Moffit*, 11 Pick. (Mass.) 499.

<sup>251</sup> *Newcomb v. Williams*, 9 Metc. (Mass.) 537.

<sup>252</sup> *Barton v. White*, 21 Pick. (Mass.) 58.

<sup>253</sup> *Ante*, p. 163, c. 10.

for his debt. If it is insolvent, he must have a decree of distribution. If it is in fact insolvent, and no judgment has been obtained, but a decree directing payment of all debts in full, this decree is a nullity, and a failure to obey it is no breach of the bond.<sup>254</sup>

The statute in many states does not include legatees in the class of persons who may bring suit without leave of the probate court. It was doubted in an early case whether, if the legacy was for a definite amount of money, a suit on the bond to recover it might not be brought without leave of the probate court; but under a statute which expressly states what persons may bring such a suit without such leave a legatee is not so empowered unless named, and must have leave to bring his suit.<sup>255</sup> But, if the bond is to pay debts and legacies, a suit may be begun by a general legatee or one whose legacy is not pecuniary, without any decree of distribution or judgment at law.<sup>256</sup> No suit can be brought upon the bond by a creditor or distributee without leave of court, until he has made demand upon the executor or administrator.<sup>257</sup> But this rule does not apply when the decree of distribution is that money shall be paid into the treasury of the commonwealth. In such case the commonwealth may sue on the bond without alleging or making a previous demand.<sup>258</sup> Nor is any demand upon the sureties necessary before bringing the suit.<sup>259</sup>

*Estoppel of Judgment or Decree.*

If a judgment is recovered against the executor or administrator, the sureties are bound by it, and cannot controvert any of the facts established by the judgment, except when the judgment is obtained by fraud.<sup>260</sup> Thus, where an incorporated company sued an administrator, and obtained judgment on a demand against the

<sup>254</sup> Dawes v. Head, 3 Pick. (Mass.) 142.

<sup>255</sup> Mass. Pub. St. c. 143; Newcomb v. Williams, 9 Metc. (Mass.) 536.

<sup>256</sup> Wood v. Barstow, 10 Pick. (Mass.) 369.

<sup>257</sup> Leland v. Kingsbury, 24 Pick. (Mass.) 315; Paine v. Moffit, 11 Pick. (Mass.) 496.

<sup>258</sup> Leland v. Kingsbury, 24 Pick. (Mass.) 315.

<sup>259</sup> Wood v. Barstow, 10 Pick. (Mass.) 368.

<sup>260</sup> Haywood v. Townsend (Sup.) 38 N. Y. Supp. 517; Heard v. Lodge, 20 Pick. (Mass.) 53.

estate, and then brought suit on the probate bond, it was held that the sureties were estopped to go into the question of whether the company was duly incorporated, and were bound by such judgment, except when the judgment was fraudulent and collusive.<sup>261</sup> This rule, however, does not cover cases under the special statute of limitations, and the sureties may show that a judgment against the executor or administrator is void because the cause of action was barred by that special statute.<sup>262</sup>

The same principle of estoppel applies when the action on the bond is brought by one entitled to distribution under a probate decree. The facts settled by that decree cannot be controverted by the defendants in the action on the bond. Thus, where a decree ordered distribution, it was held that in an action on the probate bond for failing to comply with that decree the validity of the appointment of the administrator of the distributee could not be investigated any more than the correctness of the sum awarded to him by the decree of the probate court.<sup>263</sup> In such a suit the sureties cannot impeach the settlement of the accounts in the probate court, for their obligation is that the executor or administrator shall conform to such decree, whatever it may be; and, if he does not, there is a breach of the bond.<sup>264</sup> Even if the account was fraudulently settled by the administrator or executor, the sureties cannot attack it collaterally in suit on the bond; but the account should be resettled in the probate court.<sup>265</sup>

### *Resisting Granting of Leave.*

In a suit where leave of the probate judge is a necessary prerequisite to bringing suit, the administrator or executor has no right to appear and contest the application made to the judge of probate; nor have his sureties. And after the order is made they have no right to object, in the suit on the bond, that the order was not properly granted; for the leave to sue does not fix any liability upon them, but merely gives an opportunity for the ques-

<sup>261</sup> *Heard v. Lodge*, 20 Pick. (Mass.) 53.

<sup>262</sup> *Robinson v. Hodge*, 117 Mass. 224.

<sup>263</sup> *White v. Weatherbee*, 126 Mass. 450.

<sup>264</sup> *Choate v. Jacobs*, 136 Mass. 298.

<sup>265</sup> *Paine v. Stone*, 10 Pick. (Mass.) 75.

tion of liability to be raised.<sup>266</sup> Therefore, if a surety on the bond objects in a suit on the bond that the order authorizing the suit was made before the decree which the administrator failed to obey was affirmed by the supreme court on appeal, and the affirmation certified in the probate court, this objection will not be sustained, because the order is not assailable by the administrator or his sureties.<sup>267</sup> But the executor or administrator may show that the order is void; for example, that it was made orally, when the statute only authorizes a permission in writing.<sup>268</sup> But, if the decree giving authority to sue is in writing, and purports to be dated previous to the beginning of the suit, the defendants in action on the bond cannot object that the decree was not in fact written till after suit was begun, for the decree is conclusive upon that point.<sup>269</sup> The strict wording of the statute has been slightly extended in one case; that is, when the action is brought by a person who is next of kin to recover his share of the personal estate, after a decree of the probate court ascertaining the amount due him; and this rule is held to apply to the case where such distribution is ordered by decree to be paid to the administrator of the next of kin, and suit is brought by the administrator for failure to comply with that decree. In such case no order is necessary.<sup>270</sup> If the suit is brought by a judgment creditor, or a legatee or distributee, after decree of distribution, the interest of the person bringing the suit may be contested at trial, because that is a material fact in proving his case; and, if it is defeated, the action fails.<sup>271</sup> But, if the action is brought for a general accounting, for the benefit of all interested in the estate, the fact that the person at whose request the action is brought is not interested in the estate is no defense to the action, for the judge of probate represents those interests, and the execution will be according to the interests proved in accounting.<sup>272</sup>

<sup>266</sup> *Fay v. Rogers*, 2 Gray (Mass.) 175; *Bennett v. Woodman*, 116 Mass. 518; *Richardson v. Oakman*, 15 Gray (Mass.) 57.

<sup>267</sup> *Choate v. Jacobs*, 136 Mass. 298.

<sup>268</sup> *Fay v. Rogers*, 2 Gray (Mass.) 175.

<sup>269</sup> *Richardson v. Hazelton*, 101 Mass. 108.

<sup>270</sup> *White v. Weatherbee*, 126 Mass. 452.

<sup>271</sup> *Robinson v. Hodge*, 117 Mass. 224.

<sup>272</sup> *Bennett v. Woodman*, 116 Mass. 518.

*Nature of Hearing and Decree on Bond.*

When the suit is a general one, brought by leave of the judge of probate, the judgment is general for the penalty of the bond,<sup>273</sup> and all moneys taken on execution are to be paid over to any co-executor or co-administrator of the one who has committed the breach, if there is such co-executor or co-administrator; if there is not, such moneys may be paid to the executor or administrator who committed the breach, if the judge of probate thinks fit to continue him in office,—that is, if the breach is one which does not implicate the integrity of the executor, or his fitness to administer the estate, and he submits to the judgment, and charges himself with the amount. But, generally, the executor or administrator who has committed the breach will be removed, and the assets turned over to his successors.<sup>274</sup>

A noticeable feature of this remedy is that the hearing in which the question of what amount shall be awarded on execution on the bond, when the suit is for general administration, is a hearing in equity, in which all equitable considerations governing the administration of the estate may be taken into account.<sup>275</sup> Therefore, when the suit is brought for a failure to account, the hearing in equity is similar to the settlement of the estate, as has been previously referred to in regard to a settlement of the estate in equity; for at such a hearing an account of the estate, so far as not already accounted for, is stated in the supreme court, so far as to show what is included in it as a basis for future adjustments with the executor and his sureties, and to enable the court to decide as to the charging of interest.<sup>276</sup>

The two classes of action above described—that is (1) those by a single creditor or distributee for his single, ascertained demand, brought without leave of the court, and (2) those brought by leave of the court for a general settling of the estate—are so distinct in character that an amendment of the suit cannot be made from one to the other. For instance, if the suit is brought without leave of the court by a creditor whose claim is ascertained, but who

<sup>273</sup> *Glover v. Heath*, 3 Mass. 252; *Paine v. M'Intier*, 1 Mass. 69.

<sup>274</sup> *Newcomb v. Williams*, 9 Metc. (Mass.) 537.

<sup>275</sup> Mass. Pub. St. c. 143, § 20.

<sup>276</sup> *Choate v. Arrington*, 116 Mass. 552.



has not made due demand upon the administrator therefor, the execution cannot issue for a general settling of the estate.<sup>277</sup>

### *Breaches of Bond.*

In the suits brought by a creditor or distributee the breach of the bond upon which suit is brought is the failure to pay the debt or distributive share on demand.<sup>278</sup> In the suits brought by leave of the probate court for a general accounting the breaches may be numerous and varied, for any maladministration of any kind is a breach of the condition of the bond.<sup>279</sup>

### *Liability of Sureties.*

The liability of the sureties on the probate bond is generally co-extensive with that of the executor or administrator; but in two cases the surety is released from a liability which binds the principal. One of these is in case of a judgment recovered by a creditor of the estate against the executor or administrator upon a demand which was barred before suit was brought by the special statute of limitations respecting executors and administrators. In such a case the judgment binds the executor or administrator personally, and the sureties may show in suit against them on the bond that the judgment is void as to them, as the demand was barred by the statute.<sup>280</sup> The other case is when the judgment was obtained by collusion between the creditor and the executor or administrator.<sup>281</sup> The surety who has been called upon to pay any sum upon the bond may sue his co-surety for contribution.<sup>282</sup> If one surety joins the bond as surety upon the request of the other

<sup>277</sup> *Paine v. Stone*, 10 Pick. (Mass.) 75; *Newcomb v. Wing*, 3 Pick. (Mass.) 170.

<sup>278</sup> *Ante*, p. 503. Unless the plaintiff shows that the assets are sufficient to pay all debts preferred to his, he does not show a breach of the bond. *Howe v. People* (Colo. App.) 44 Pac. 512. But the administrator who relies upon payment of debts which exhaust the estate must show payments of debts which were legal demands against the estate. *Clement v. Hawkins*, 22 S. E. 951, 96 Ga. 811.

<sup>279</sup> *Loring v. Kendall*, 1 Gray (Mass.) 312. As to what constitutes maladministration, see *ante*, p. 254, c. 15.

<sup>280</sup> *Robinson v. Hodge*, 117 Mass. 224.

<sup>281</sup> *Heard v. Lodge*, 20 Pick. (Mass.) 53. If the executor or administrator owes money to the estate, he is chargeable with it in his accounts, but his sureties are not liable for it on his probate bond. *Keegan v. Smith* (City Ct. N. Y.) 39 N. Y. Supp. 826.

<sup>282</sup> *Blake v. Cole*, 22 Pick. (Mass.) 97.

surety, who promises to hold him harmless, the surety so guarantying cannot sue the other surety for contribution, even though the promise was oral.<sup>283</sup> If a surety, after the administrator has been removed for maladministration, is appointed administrator, and charges himself with the amount of his indebtedness on the bond, as assets of the estate, this is regarded, upon the principle already stated, as a discharge of the debt, and the former administrator is relieved from liability to that amount, and the surety becomes personally liable to the estate. The former administrator, however, is still indebted personally to the surety.<sup>284</sup>

By provision of statutes before noticed, in many states sureties may be discharged from the bond upon making proper application and another bond given. In such case the liability of the sureties for subsequent breaches ceases. Their liability for previous breaches continues.<sup>285</sup> It has been decided that, if no breach of the bond is shown except a failure to account, the liability is for nominal damages; but, if there has been a substantial misappropriation of funds before the discharge, the surety would be liable for that.<sup>286</sup> Suit on such a bond is not barred until the time has elapsed which bars suits on sealed instruments.<sup>287</sup>

<sup>283</sup> *Id.*

<sup>284</sup> *Hazelton v. Valentine*, 113 Mass. 472. See ante p. 242, c. 14.

<sup>285</sup> *McKim v. Blake*, 132 Mass. 343; *McKim v. Bartlett*, 129 Mass. 226. Cf. ante, p. 192, c. 12. In some states, statutes provide that sureties must be summoned to the accounting of their principal, in which case, if they are not summoned, a decree rendered on the accounting does not bind them. *Keegan v. Smith* (City Ct. N. Y.) 39 N. Y. Supp. 826.

<sup>286</sup> *McKim v. Bartlett*, 129 Mass. 226.

<sup>287</sup> *Prescott v. Read*, 8 Cush. (Mass.) 365; *White v. Swain*, 3 Pick. (Mass.) 365; *Thayer v. Keyes*, 136 Mass. 104.

## CHAPTER XXIV.

### STATUTE OF LIMITATIONS—SET-OFF.

220. Statutes of Limitation.

221. General Statutes of Limitation.

222. Special Statutes of Limitation.

223-224. Set-Off.

### STATUTES OF LIMITATION.

220. Statutes of limitation applicable to executors and administrators may be divided into two classes:

- (a) General statutes of limitation.
- (b) Special statutes of limitation.

### SAME—GENERAL STATUTES OF LIMITATION.

221. By general statutes of limitation, which apply to the claims for or against the deceased, as well as to all other debts, claims, etc., if any claim in favor of or against the deceased was barred before his death, or after a limited time after his death, the claim remains barred; while, if not so barred, the operation of the statute is in some states suspended for a limited time.

Such statutory provisions in the general statute of limitations are to the effect that, if a person entitled to bring or liable to an action dies before the action is barred by the general statute, or within a limited time thereafter,<sup>1</sup> and the cause of action survives, the action may be commenced by or against the executor or administrator of such deceased person at any time within a limited time from the grant of letters testamentary or of administration;<sup>2</sup> and if, in an action duly commenced within the time limited, the

<sup>1</sup> See the local statutes of limitations; *Bacon v. Pomeroy*, 104 Mass. 583.

<sup>2</sup> *Everitt v. Williams*, 45 N. J. Law, 140.

action is abated by the death of a party, an action may be begun within a limited time after the original suit is abated.<sup>3</sup> Thus, if a person entitled to bring an action dies before the cause of action is barred, or within the limited time thereafter, his executor or administrator may bring the action within the time limited thereafter after he has been appointed; and, when a person liable to an action dies before or within the limited time after the cause of action is barred, his executor or administrator is liable to said action for a stated period after he has received letters of administration.<sup>4</sup> But, if either debtor or creditor dies after the limited time after the statutory period has elapsed, no action can be brought by or against the executor or administrator.<sup>5</sup>

*Waiver of Statute—Part Payment—New Promise.*

In case of a debt due by the deceased, it was at one time held that the executor or administrator was not bound to take advantage of this general statute of limitation, but might waive it and pay the debt.<sup>6</sup> But the contrary is now held, and the executor or administrator must plead the statute.<sup>7</sup> The executor or administrator cannot waive the statute in favor of a debt, due to himself by the deceased, which was barred by the statute at the death of the deceased.<sup>8</sup> As to the special statute of limitations, as will be seen later, a waiver is generally not allowed.<sup>9</sup>

The effect of part payment or a new promise by one of several executors or administrators is generally governed by statutes relating to that particular subject. In the absence of statutes upon this subject, it is held that a new promise, removing the bar of the statute, may be made by an executor or administrator, or by one of several executors or administrators, in his representative capacity, and will bind the others in their representative capacity.<sup>10</sup>

<sup>3</sup> Bacon v. Pomeroy, 104 Mass. 583.

<sup>4</sup> Hill v. Mixer, 5 Allen (Mass.) 27.

<sup>5</sup> See local statutes of limitations; Fisher v. Metcalf, 7 Allen (Mass.) 210.

<sup>6</sup> Fisher v. Metcalf, 7 Allen (Mass.) 209; Foster v. Starkey, 12 Cush. (Mass.) 324; Emerson v. Thompson, 16 Mass. 429; Pursel v. Pursel, 14 N. J. Eq. 514.

<sup>7</sup> See ante, p. 332, c. 17; Voorman v. Li Po Tai (Cal.) 45 Pac. 470.

<sup>8</sup> Ex parte Richmond, 2 Pick. (Mass.) 567.

<sup>9</sup> Post, p. 530.

<sup>10</sup> Shreve v. Joyce, 36 N. J. Law, 44; Emerson v. Thompson, 16 Mass. 431;

The provision of the statutes upon the question how far one of several joint executors or administrators is bound by a new promise or part payment by another is generally to the effect that no one of two or more joint executors or administrators of a contract or shall lose the benefit of the statute by reason only of an acknowledgment or promise made or signed, or of a payment made by any other or others of them. But the judgment may be given against the one who is bound by the new promise, and for the one who is not.<sup>11</sup> In Pennsylvania and Connecticut it has been held that, if the debt is barred by the statute, a new promise by the executor or administrator will not bind him to pay the debt in his official capacity.<sup>12</sup> In other respects the same rules as to part payment or a new promise by a single executor or administrator apply as in ordinary cases in regard to the statute of limitations.<sup>13</sup>

The time limit of the statute of limitations applies as well to suits in equity as to actions at law.<sup>14</sup> There are, however, certain cases of fraud in which equity will relieve against the statute.<sup>15</sup> A debt may be barred by the special statute of limitations of actions against executors or administrators, although it is still suable so far as the general statute is concerned.<sup>16</sup> Failure to give the notice of appointment required by law of executors and administrators does not affect the running of the general statute of limitations, although it does affect the special statute.<sup>17</sup> In some states the general statute of limitations is suspended during the time in which the estate is being settled.<sup>18</sup>

Johnson v. Beardslee, 15 Johns. (N. Y.) 3; Hammon v. Huntley, 4 Cow. (N. Y.) 494; Cayuga Co. Bank v. Bennett, 5 Hill (N. Y.) 236. See ante, p. 486, c. 23.

<sup>11</sup> Smith v. Kimball, 105 Mass. 499.

<sup>12</sup> Fritz v. Thomas, 1 Whart. (Pa.) 66; Reynolds v. Hamilton, 7 Watts (Pa.) 420; Clark v. Maguire's Adm'x, 35 Pa. St. 259; Peck v. Botsford, 7 Conn. 72.

<sup>13</sup> Preston v. Cutter, 13 Atl. 874, 64 N. H. 461.

<sup>14</sup> Low v. Bartlett, 8 Allen (Mass.) 259; Burditt v. Grew, 8 Pick. (Mass.) 108; Sugar River Bank v. Fairbank, 49 N. H. 139, 140.

<sup>15</sup> Wells v. Child, 12 Allen (Mass.) 333. See 2 Story, Eq. Jur. § 1521.

<sup>16</sup> Harlow v. Dehon, 111 Mass. 198.

<sup>17</sup> Knowles v. Whaley, 23 Atl. 144, 15 R. I. 97. Cf. ante, p. 332, c. 17.

<sup>18</sup> Wise v. Williams, 14 Pac. 204, 72 Cal. 544.

*Limitations of Time before Bringing Suit.*

There exist in some states special statutory limitations by which no suit shall be brought by a creditor of the deceased against the executor or administrator within a limited time, generally one year from the time of giving his bond, unless the demand of the suit is one which would not be affected by the insolvency of the estate, or is brought after the estate is represented insolvent, to ascertain a contested claim.<sup>19</sup> It has been held that an action for funeral expenses is not covered by this statute, but is within the exception of the statute, and that an action may be brought within a year from the giving bond or giving notice according to the provisions of the statute.<sup>20</sup> So, a suit pending against the deceased at his death may be revived within the statutory time.<sup>21</sup>

**SAME—SPECIAL STATUTES OF LIMITATION.**

**222.** In many states special statutes exist by which the time is limited within which a creditor of the estate may sue the executor or administrator. The statutes in those states, which show the distinctive features of the various rules, are as follows:

**CALIFORNIA.** In California, if a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within six months from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.<sup>22</sup>

<sup>19</sup> *Word v. Word*, 7 South. 412, 90 Ala. 81; *Alabama State Bank v. Glass*, 2 South. 641, 82 Ala. 278; *Amoskeag Manuf'g Co. v. Barnes*, 48 N. H. 25, 29; *Cornell v. Clark*, 19 Atl. 1080, 17 R. I. 27; ante, p. 527.

<sup>20</sup> *Studley v. Willis*, 134 Mass. 155. Cf. ante, p. 313, c. 17.

<sup>21</sup> *Quick v. Campbell*, 22 S. E. 479, 44 S. C. 386.

<sup>22</sup> Cal. Code Civ. Proc. § 353. See, also, *Gillespie v. Wright*, 28 Pac. 862, 93 Cal. 169.

**CONNECTICUT.** In Connecticut, when the creditor of an estate not represented insolvent shall present his claim to the executor or administrator within the time limited by the court of probate, or by any provision of this chapter, and he shall disallow and refuse to pay it, if such creditor shall not, within four months after written notice that this claim is disallowed, commence a suit against him for the recovery thereof, he shall be debarred of his claim against such estate; but if such creditor die within the said four months, and before suit brought as aforesaid, a further period of four months shall be allowed in favor of his executor or administrator.<sup>23</sup>

**ILLINOIS.** In Illinois all demands against the estate of any testator or intestate shall be divided into classes in manner following, to wit: All other debts and demands of whatsoever kind, with regard to quality or dignity, which shall be exhibited to the court within two years from the granting of letters as aforesaid, and all demands not exhibited within two years as aforesaid, shall be forever barred, unless the creditors shall find other estate of the deceased not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid pro rata out of such subsequently discovered estate, saving, however, to femes covert, infants, persons of unsound mind, or imprisoned, or without the United States in the employment of the United States, or of this state, the term of two years, after their respective disabilities are removed, to exhibit their claims.<sup>24</sup>

**MAINE.** In Maine, actions against executors or administrators on claims against the estate, with two exceptions, shall, if brought after the time limited in a preceding section, be continued at the cost of the plaintiff until the next term of court, and for such further time, and on such other terms, as the court may order, unless, at least thirty days before commencement of suit, and within two years after notice given by him of his appointment, such claim was presented in writing, and payment demanded, or was filed in the probate office, supported by affidavit of the claimant or of some other person cognizant thereof, as provided in section 62 of chapter 64, and such notice given as the court orders thereon. A tender

<sup>23</sup> Conn. Gen. St. § 583.

<sup>24</sup> Ann. St. (Starr & C.) c. 3, par. 70, subd. 7.

of payment, or offer thereof, filed in the case during the time of such continuance, shall bar the same, and the defendant shall recover his costs; and no action shall be maintained on such claim, unless commenced during said two years, or within six months following, except as provided in the following sections. Executors or administrators residing out of the state at the time of giving notice of their appointment shall appoint an agent or attorney in the state, and insert therein his name and address. Executors or administrators removing from the state after giving notice of their appointment shall appoint an agent or attorney in the state, and give public notice thereof. Demand or service made to such agents or attorneys has the same effect as if made on such executor or administrator. When an executor or administrator residing out of the state has no agent or attorney in the state, demand or service may be made on one of his sureties, with the same effect as if made on him.<sup>25</sup>

MARYLAND. In Maryland it is provided that, if a claim be exhibited against an administrator which he shall think it his duty to dispute or reject, he may retain in his hands assets proportioned to the amount of the claim, which assets shall be liable to other claims, or to be delivered up or distributed, in case the claim be not established; and if, on any claims exhibited and disputed as aforesaid, the creditor or claimant shall not, within nine months after such dispute or rejection, commence a suit for recovery, the creditor shall be forever barred, and the administrator may plead this in bar, together with the general issue or other plea proper to the case; and on any dividend to be made nine months after such dispute or rejection, and failure to bring suit, the administrator may proceed to pay or distribute as if he had not knowledge or notice of such claim, or as if it did not exist.<sup>26</sup>

MASSACHUSETTS. In Massachusetts it is provided that "no executor or administrator, after having given due notice of his appointment, shall be held to answer to the suit of a creditor of the deceased, unless such suit is commenced within two years from the time of his giving bond for the discharge of his trust, except as

<sup>25</sup> Rev. St. c. 87, § 12.

<sup>26</sup> Rev. Code, art. 50, § 173



is hereinafter provided.<sup>27</sup> If the supreme judicial court, upon a bill in equity filed by a creditor whose claim has not been prosecuted within the time limited by the preceding section, is of opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not presenting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person, but such judgment shall not affect any payment or distribution made before the filing of such bill.<sup>28</sup> When assets come to the hands of an executor or administrator after the expiration of two years from the time of his giving bond, he shall account for and apply the same as if they had been received within two years, and shall be liable to an action or proceeding for the benefit of creditors, if such is commenced within one year after the creditor had notice of the receipt of the new assets by the administrator or executor, and within two years after the assets were actually received.<sup>29</sup> If an action commenced against an executor or administrator before the expiration of two years from the time of his giving bond fails of sufficient service or return by an unavoidable accident; if the writ in such action is abated or defeated in consequence of a defect in the form thereof, or of a mistake in the form of the proceeding; if, after a verdict for the plaintiff, judgment is arrested; or if a judgment for the plaintiff is reversed on writ of error,—the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original action, or after the reversal of the judgment therein.”<sup>30</sup>

Special provision is made in Massachusetts for the protection of creditors whose claims have not accrued within the two years limited by law for the prosecution of suits against executors and administrators, as follows: A creditor of the deceased, whose right of action does not accrue within two years after the giving of the administration bond, may present his claim to the probate court at any time before the estate is fully administered; and if, on examination thereof, it appears to the court that such claim is or may

<sup>27</sup> Pub. St. c. 136, § 9.

<sup>29</sup> Pub. St. c. 136, § 11.

<sup>28</sup> Pub. St. c. 136, § 10.

<sup>30</sup> Pub. St. c. 136, § 12.

become justly due from the estate, it shall order the executor or administrator to retain in his hands sufficient to satisfy the same. But if a person interested in the estate offers to give bond to the alleged creditor, with sufficient surety or sureties for the payment of his claim, in case it is proved to be due, the court may order such bond to be taken, instead of requiring assets to be retained as aforesaid. This provision, so far as it relates to claims to become due, does not apply to or affect any estate which was in process of settlement on the 28th of February, 1879. The decision of the probate court upon the claim of such creditor is not conclusive against the executor or administrator, or any person interested to oppose the allowance thereof; and they shall not be compelled to pay the same, unless it is proved to be due in an action commenced by the claimant within one year after his claim becomes payable, or, if an appeal is taken from the decision of the probate court, in an action commenced within one year after the final determination of the proceedings on such appeal. The action should be upon the bond, if any has been given; otherwise, against the executor. If the action is upon the bond, the plaintiff should set forth his original cause of action against the deceased, in the same manner as he would in a declaration against the executor or administrator upon the same demand, and may allege nonpayment of the demand as a breach of the condition of the bond; and the defendant may avail himself of any matter of defense that would be available in law against the demand if prosecuted in the usual manner against the executor or administrator.<sup>31</sup>

When an executor dies, resigns, or is removed, without having fully administered the estate of the deceased, and a new administrator is appointed, such new administrator will be liable to the actions of creditors for two years after he has given bond for the discharge of his trust, unless such actions were barred prior to the termination of the previous administration; but, after the expiration of said two years, he will, if he has given due notice of his appointment, have the benefit of the same limitations as in case of an original administrator or executor. And, if new assets come into his hands after the time limited for beginning actions

<sup>31</sup> Pub. St. c. 136, §§ 13-16.

against him has expired, he will have to account for such new assets, and will be liable to actions therefor just as an original executor or administrator would be.<sup>32</sup>

**MICHIGAN.** In Michigan the rule is that every person having a claim against a deceased person, proper to be allowed by the commissioners, who shall not, after the publication of notice as required by law, exhibit his claim to the commissioners within the time limited by the court for that purpose, shall be forever barred from recovering such demand, or from setting off the same in any action whatever. And all actions and suits which may be pending against a deceased person at the time of his death may, if the cause of action survives, be prosecuted to final judgment, and the executor or administrator may be admitted to defend the same; and, if judgment shall be rendered against the executor or administrator, the court rendering it shall certify the same to the probate court, and the amount thereof shall be paid in the same manner as other claims duly allowed against the estate.<sup>33</sup>

**NEW HAMPSHIRE.** In New Hampshire no suit shall be maintained against any administrator for any cause of action against the deceased unless the same is commenced within three years next after the original grant of administration, exclusive of the time such administration may have been suspended, except in cases where he has retained estate in his hands for the payment of such claim by order of the judge.<sup>34</sup>

**NEW JERSEY.** In New Jersey any creditor who shall not exhibit his claim to the executor or administrator within the time limited and prescribed by the court, on notice, shall be forever barred from prosecuting or recovering his said demand, unless the estate shall prove sufficient, after all debts exhibited and allowed are fully satisfied, or such creditors shall find some other estate not inventoried or accounted for by the executor or administrator before distribution, in which case such creditor shall receive his ratable proportion out of the same.<sup>35</sup> And it is further provided that, if any person against whom there is or shall be any such cause of action as is specified in certain sections of the act shall

<sup>32</sup> Pub. St. c. 136, §§ 17, 18, 11.

<sup>33</sup> Ann. St. §§ 5901, 5903.

<sup>34</sup> Gen. Laws, c. 198, § 5.

<sup>35</sup> Revision, tit. "Orphans' Courts," § 94.

have died or shall thereafter die before the expiration of the times of limitation therein mentioned, the space or term of six months next succeeding the death of such person shall not be computed as part of the limited period within which such action or actions is or are required to be brought by the said sections.<sup>36</sup>

NEW YORK. In New York, among the actions which must be brought within three years, is enumerated an action against an executor, administrator, or receiver, or against the trustee of an insolvent debtor, appointed, as prescribed by law, in a special proceeding instituted in a court or before a judge, brought to recover a chattel or damages for taking, detaining, or injuring personal property by the defendant or the person whom he represents.<sup>37</sup>

OHIO. In Ohio it is provided that, if a claim against the estate of any deceased person be exhibited to the executor or administrator before the estate is represented insolvent, and be disputed or rejected by him, and the same shall not have been referred, the claimant shall, within six months after such dispute or rejection if the debt, or any part thereof, be then due, or within six months after some part thereof shall have become due, commence a suit for the recovery thereof, or be forever barred from maintaining any action thereon; and no action shall be maintained thereon after the said period by any other person deriving title thereto from such claimant. A claim shall be deemed disputed or rejected if the executor or administrator shall, on presentation of the vouchers thereof, refuse, on demand made for that purpose, to indorse thereon his allowance of the same as a valid claim against the estate.<sup>38</sup>

RHODE ISLAND. In Rhode Island the rule is that "no action shall be brought against any executor or administrator in his said capacity within one year after the will shall be proved or administration granted, nor after three years from the time of such proof or grant, except for the causes mentioned in section 17 of chapter 186, provided notice of his appointment be given according to law, said periods to be reckoned from the time of giving such notice." And the same rule in another section is stated to

<sup>36</sup> Revision, tit. "Limitation of Actions," § 9.

<sup>37</sup> 4 Rev. St. (7th Ed.) § 383, subd. 4. See, also, *Snell v. Dale*, 17 N. Y. Supp. 575, 63 Hun, 626.

<sup>38</sup> Rev. St. § 6097.

be that "no action shall be brought against any executor or administrator in his said capacity within one year after the will shall be proved or administration granted, except for medicines and attendance in the last sickness, and funeral charges of the deceased, and excepting, also, actions brought in pursuance of section 7 of this chapter; nor shall any action be brought against any executor or administrator in his said capacity unless the same shall be commenced within three years next after the will shall be proved or administration shall be granted: provided, such executor or administrator shall give notice of his appointment by publishing the same in some public newspaper in this state, nearest to the place in which the deceased person last dwelt, or in such other manner as the court of probate shall direct, said periods to be reckoned from the time of giving such notice." <sup>39</sup>

VERMONT. In Vermont, "if a person entitled to bring an action before mentioned in this chapter, or liable to such action, dies before the expiration of the time limited therefor, or within thirty days after, and if the cause of action survives, the action may be commenced by or against the executor or administrator within two years after such death, or the same may be presented to the commissioners on the estate within two years after the grant of letters testamentary or of administration, and not after, if barred by the provisions of this chapter; but, if the commissioners on such estate are required to make their report to the probate court before the expiration of said two years, the claim against the deceased shall be presented to the commissioners within the time allowed other creditors to present their claims." <sup>40</sup>

VIRGINIA. In Virginia the statute provides that "every action to recover money which is founded upon an award, or on any contract, other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say: If the case be upon an indemnifying bond. taken under any statute, or upon a bond of an executor, administrator, guardian, curator, committee, sheriff or sergeant, deputy sheriff or sergeant, clerk or deputy clerk, or any other fiduciary or public officer, or upon any other contract

<sup>39</sup> Pub. St. c. 189, § 8; Id. c. 205, § 9.

<sup>40</sup> Rev. Laws, § 972.

by writing under seal, within ten years; if it be upon an award, or be upon a contract by writing, signed by the party to be charged thereby, or by his agent, but not under seal, within five years; if it be upon any oral contract, express or implied, for articles charged in a store account, although such articles be sold on a written order, within two years; and, if it be upon any other contract, within three years, unless it be an action by one partner against his co-partner for a settlement of the partnership accounts, or upon accounts concerning the trade of merchandise between merchant and merchant, their factors or servants, where the action of account would lie, in either of which cases the action may be brought until the expiration of five years from a cessation of the dealings in which they are interested together, but not after: provided, that the right of action against the estate of any person hereafter dying, on any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or, if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued."<sup>41</sup>

*Cases on the Statutes.*

In computing the time within which an action may be brought against an executor or administrator, the day of giving the bond, and presumably of giving the notice, is to be excluded from the computation.<sup>42</sup> A peculiarity of the special statute of limitations already adverted to is that the executor or administrator cannot waive its provisions, but must set it up as a defense; and, if he does not, the judgment does not bind the estate, but only himself.<sup>43</sup> Nor will the judgment affect a surety upon the probate bond; for, if action is brought on the probate bond for nonpayment of the judgment, the surety may set up the fact that the original

<sup>41</sup> Code, § 2920.

<sup>42</sup> *Paul v. Stone*, 112 Mass. 27.

<sup>43</sup> *Preston v. Cutter*, 13 Atl. 874, 64 N. H. 461; *Thayer v. Hollis*, 3 Metc. (Mass.) 369; *Wells v. Child*, 12 Allen (Mass.) 333, 336; *Bacon v. Pomeroy*, 104 Mass. 577, 585; ante, p. 332, c. 17.

claim was barred by the statute.<sup>44</sup> The special statute of limitations does not run till a proper bond is given. If the bond is to be without sureties, there must, by statute in Massachusetts, be a proper notice to creditors and persons interested in the estate; but the general notice to all persons interested in the estate is sufficient to make the bond good.<sup>45</sup> The effect of not giving a proper bond is discussed in earlier sections.<sup>46</sup> The special statute also depends upon the publication of proper notices of the appointment of the executor or administrator. The effect of these notices has already been discussed.<sup>47</sup>

The special statute of limitations of actions against executors or administrators applies to actions brought against those who have given bond to pay debts and legacies, as well as those who have given the ordinary bond.<sup>48</sup> If there is a change in the administration, it does not affect a claim already barred. Thus, an administrator de bonis non is not liable for a debt which was barred by the lapse of time as to the previous administrator.<sup>49</sup> If the debt was not barred as to the previous administrator, the period of the statute takes a new start at the appointment of the administrator de bonis non, and runs two years from his appointment.<sup>50</sup>

The statute applies only to creditors, and does not include actions for legacies,<sup>51</sup> nor general administration suits on bonds for breach of the bond by maladministration of the executor or administrator. In such case the action may be brought within twenty years from the breach complained of, since the bond is a sealed instrument, and actions on sealed instruments are limited to that

<sup>44</sup> *Dawes v. Shed*, 15 Mass. 6; *Robinson v. Hodge*, 117 Mass. 222. Cf. ante, p. 525, c. 23.

<sup>45</sup> *Wells v. Child*, 12 Allen (Mass.) 330.

<sup>46</sup> Ante, p. 187, c. 12.

<sup>47</sup> Ante, p. 206, c. 13.

<sup>48</sup> *Jenkins v. Wood*, 134 Mass. 115; *Troy Nat. Bank v. Stanton*, 116 Mass. 435; *Thompson v. Brown*, 16 Mass. 172.

<sup>49</sup> *Veazie v. Marrett*, 6 Allen (Mass.) 342.

<sup>50</sup> *Brittain v. Dickson*, 10 S. E. 701, 104 N. C. 547; *Eddy v. Adams*, 14 N. E. 509, 145 Mass. 489; *Fisher v. Metcalf*, 7 Allen (Mass.) 210; Mass. Pub. St. c. 136, § 17; *Hemenway v. Gates*, 5 Pick. (Mass.) 321.

<sup>51</sup> *Kent v. Dunham*, 106 Mass. 586; *Brooks v. Lynde*, 7 Allen (Mass.) 64.

time.<sup>52</sup> The statute bars a suit to recover taxes,<sup>53</sup> but not a suit to recover specific trust funds.<sup>54</sup>

*Exceptions to the Bar.*

In regard to the exception to the bar of the statute, when justice and equity require such exception, it is held that, if proper legal notice of appointment has been given, the creditor cannot avail himself of a lack of knowledge of the death of the debtor or the appointment of the executor or administrator, unless, possibly, if the case showed a peculiar state of facts, whereby it was impossible that the creditor should have known of the death or the notices of appointment, though even then no case is known to have so decided. This rule arises from the fact that the notice and statute of limitations are intended to secure a speedy settlement of the estate.<sup>55</sup> But if the executor or administrator makes misleading statements of fact, by which the creditor is induced to delay suit until the statute bars it, or otherwise fraudulently delays proceedings, the statute is avoided.<sup>56</sup> But it is held that requests by the executor to the creditor to delay suit, the executor alleging that he expects to realize funds, and will then pay the debts, does not amount to fraud, though whether this would be so held if the executor makes such statements, knowing them to be false, does not appear to have been decided.<sup>57</sup> Ignorance of the existence of the special statute of limitations does not avoid the bar.<sup>58</sup>

It is held in the case below cited that the exception in this statute which relates to cases in which justice and equity require the allowance of the debt is to be construed as meaning that such debt shall be allowed, despite the special statute of limitations, in the same cases in which equity would relieve a creditor against the general statute of limitations, which are enumerated as follows:

<sup>52</sup> Thayer v. Keyes, 136 Mass. 104.

<sup>53</sup> Rich v. Tuckerman, 121 Mass. 222.

<sup>54</sup> Tyler v. Mayre (Cal.) 27 Pac. 160; Roach v. Caraffa, 25 Pac. 22, 85 Cal. 436.

<sup>55</sup> Sykes v. Meacham, 103 Mass. 285; Richards v. Child, 98 Mass. 284.

<sup>56</sup> Wells v. Child, 12 Allen (Mass.) 335.

<sup>57</sup> Jenney v. Wilcox, 9 Allen (Mass.) 245; Waltham Bank v. Wright, 8 Allen (Mass.) 121.

<sup>58</sup> Jenney v. Wilcox, 9 Allen (Mass.) 245.



Cases where there has been a fraudulent concealment of the cause of action, in which case the statute runs from the time that the cause of action is discovered; trusts, in which case the statute does not apply; cases where the debtor has fraudulently prolonged unfounded litigation, so as to defeat the right to proceed in another suit.<sup>59</sup>

In a state where the statute requires suit to be brought within a specified time after the qualification of the representative, and in fact the cause of action did not accrue within the life of the deceased, it is held that the suit may be brought within the specified time after the accrual of the cause of action.<sup>60</sup> If the statute begins to run after the appointment of an executor or administrator, and none is in fact appointed, the statute does not begin to run.<sup>61</sup>

In a case arising in Massachusetts the facts were somewhat peculiar. A creditor of the estate brought suit against the administrator in Vermont, the principal administrator being in Massachusetts. The suit in Vermont was delayed, and judgment not rendered till after the statute bar had run in the Massachusetts estate. The creditor then brought a bill in equity to enforce the judgment in Massachusetts; but the court held that there was no privity between the two administrations, and that the creditor might have sued in both states at once, and that there was no equity to relieve the creditor from the statute.<sup>62</sup>

#### SET-OFF.

**223. When the executor or administrator sues or is sued in his representative capacity, and the other party to the suit owes a debt to the estate, or is owed by the estate, if the estate is solvent the debt may be set off against the deceased in suit in the same manner as set-off is allowed in suits between individuals. But, if the executor or administrator sues**

<sup>59</sup> Wells v. Child, 12 Allen (Mass.) 333.

<sup>60</sup> Jones v. Whitworth, 30 S. W. 736, 94 Tenn. 602. Cf. ante, p. 341, c. 17.

<sup>61</sup> Perkins v. Sturdivant (Miss.) 4 South. 555.

<sup>62</sup> Low v. Bartlett, 8 Allen (Mass.) 259. Cf. ante, p. 162, c. 10.

or is sued in his individual capacity, a debt due to or by the estate cannot be offset.

**224.** If the estate is insolvent, set-off cannot be made if it cannot be known what amount of his claim the creditor will be entitled to; but, if this amount is settled, the set-off may be made.

Whenever either party to a suit to which the executor or administrator is a party sues or is sued as executor or administrator, and there are mutual debts between the testator or intestate and the other party, if the estate is solvent one debt may be set off against the other.<sup>63</sup> But in an action by an executor or administrator in his own name, to recover money due to the testator or intestate in his lifetime, and received by the defendant after his death, the defendant cannot set off a debt due to him from the testator or intestate, because the money is due to the executor or administrator;<sup>64</sup> or where the plaintiff declares, as executor or administrator, for a debt due after the death of the testator or intestate;<sup>65</sup> or where he sues on a note given to him as security for a debt due to the deceased.<sup>66</sup> Nor can there be any set-off between a debt owing in the representative capacity and a personal debt.<sup>67</sup> In settling estates in insolvency under the statute, a greater latitude of set-off is allowed than in ordinary suits at law. For in the latter case only liquidated demands, or those

<sup>63</sup> *Gerdtsen v. Cockrell*, 55 N. W. 58, 52 Minn. 501; *Hickas v. Bank*, 32 Atl. 63, 168 Pa. St. 635; *Jarvis v. Rogers*, 15 Mass. 389, 407; *Knapp v. Lee*, 3 Pick. (Mass.) 452, 460; *Boardman v. Smith*, 4 Pick. (Mass.) 212, 215; *Richardson v. Parker*, 2 Swan (Tenn.) 529; *Granger v. Granger*, 6 Ohio, 35; *Ray v. Dennis*, 5 Ga. 357; *Peacock v. Haven*, 22 Ill. 23; *Smalley v. Trammel*, 11 Tex. 10; *Mitchell v. Rucker*, 22 Tex. 66; *Traders' Nat. Bank v. Cresson*, 12 S. W. 819, 75 Tex. 298.

<sup>64</sup> *Seaver v. Weston*, 39 N. E. 1013, 163 Mass. 202; *Shipman v. Thompson*, Willes, 103; *Newhall v. Turney*, 14 Ill. 338; *Aiken v. Bridgman*, 37 Vt. 249; *Sanford v. Foss*, 58 Mo. App. 474.

<sup>65</sup> *Schofield v. Corbett*, 11 Q. B. 779; *Rees v. Watts*, 11 Exch. 410; *Patterson v. Patterson*, 59 N. Y. 574.

<sup>66</sup> *Grew v. Burditt*, 9 Pick. (Mass.) 265.

<sup>67</sup> *Tenant v. Tenant*, 1 Atl. 532, 110 Pa. St. 478. Nor a claim against the administrator for a tort against a debt due to the decedent, even if the tort is waived and the action is *assumpsit*. *Parker v. Doughtry* (Ala.) 20 South. 362.

which are capable of being ascertained by calculation, are allowed to be set-off; whereas in the former cases all mutual claims of all kinds are offset, and the balance only is the demand due to the estate.<sup>68</sup>

In an action by an executor for a debt due to the deceased, the defendant may offset any amount paid by him for funeral expenses, those expenses being, as had already been said, held to be in the nature of a debt due by the deceased, and not by the executor or administrator, unless he has ordered or ratified them himself.<sup>69</sup> If an administrator, in his representative capacity, has a judgment in his favor against a debtor of the estate, and in another case there is a judgment against him for costs in a suit by him in the same capacity, these two judgments may be offset, although the judgment for costs is by statute to be collected of the administrator personally or from his goods.<sup>70</sup> If the demand which is alleged as a set-off is barred by the special statute of limitation of actions against executors and administrators, it cannot be set off, but the limitation is to be applied as if an action had been brought on the demand at the same time as the action in which it is set off. Therefore, where executors brought suit on a promissory note, payable to the deceased, and the maker put in a set-off, it was held that, although the declaration in set-off was not filed till after the period had elapsed during which actions might be brought against executors or administrators, the set-off was not thereby barred, since the statute of limitations was to be applied as of the time when the original action was brought.<sup>71</sup>

The principle that set-off can only take place between debts due in the same capacity applies in equity as well as at law. Therefore a debt due from an executor cannot be set off against a debt

<sup>68</sup> *Bigelow v. Folger*, 2 Metc. (Mass.) 256; *Morrison v. Jewell*, 34 Me. 146-148; *Bordman v. Smith*, 4 Pick. (Mass.) 212, 215; *Phelps v. Rice*, 10 Metc. (Mass.) 128.

<sup>69</sup> *Ante*, p. 313, c. 17; *Adams v. Butts*, 16 Pick. (Mass.) 343; *Blood v. Kane*, 6 N. Y. Supp. 353, 52 Hun, 225.

<sup>70</sup> *Jones v. Carpenter*, 9 Metc. (Mass.) 510. An administrator can set off a personal claim for money advanced on a distributive share against the share itself. *Barker v. Laney*, 35 N. Y. Supp. 626, 90 Hun, 108.

<sup>71</sup> *Parker v. Doughtry* (Ala.) 20 South. 362; *Colt v. Cone*, 107 Mass. 285; *Tyler v. Boyce*, 135 Mass. 558.

due to the testator. Accordingly, where the plaintiff was residuary legatee and surviving executrix of her husband, to whom A. and a bankrupt had given a joint bond, the other obligor being dead, and the plaintiff was indebted upon her private account to the bankrupt, Lord Hardwicke refused an injunction to a suit upon the bond, saying that the debts were in different rights, and that there was no mutual credit.<sup>72</sup> But in equity the real beneficial interest will be regarded, and not the nominal ownership.<sup>73</sup> In the same way, when a judgment has been rendered in favor of a legatee, in a suit in the name of a judge of probate on a probate bond, in which case a hearing in equity is held to ascertain the amount due, or the judgment on the bond, an executor may have a judgment in his favor on a promissory note, payable by the legatee, offset on the judgment on the bond, since the suit on the bond is really in right of the legatee, and the judge of probate is only a nominal party.<sup>74</sup> And it seems that in Massachusetts, under the statutes, the actual beneficial interest in the claim is at law, as well as in equity, the point in question, the statute providing for the set-off of claims belonging to the estate. Thus, where, in a suit against an administrator, he attempted to set off a note payable to the deceased, but sold by him, during his life, to the administrator, but not indorsed by him, it was held that the set-off could not be maintained, since the note really belonged to the administrator, and not to the estate, and, by indorsing it as administrator to himself, he could at any time complete the formal title in himself.<sup>75</sup>

<sup>72</sup> *Bishop v. Church*, 3 Atk. 691.

<sup>73</sup> *Jones v. Mossop*, 3 Hare, 568; *Williams, Ex'rs*, 1878, 1879.

<sup>74</sup> *Barrett v. Barrett*, 8 Pick. (Mass.) 342.

<sup>75</sup> *Stickney v. Clement*, 7 Gray (Mass.) 170. See, on the subject of assigned claims, *Kinsey v. Ring*, 53 N. W. 842, 83 Wis. 536.

**CHAPTER XXV.****EVIDENCE AND COSTS.**

- 225. Proof in Cases Involving Executors or Administrators.
- 226. Books of Account, Admissibility of.
- 227. Admissions of the Deceased, or of Executor or Administrator.
- 228. Parties as Witnesses in Suits by or against Executors or Administrators.
- 229. Costs.

**PROOF IN CASES INVOLVING EXECUTORS OR ADMINISTRATORS.**

225. Where one of the parties to the transaction in issue is dead, the other party cannot testify either in his own behalf or in behalf of a person claiming under him as to any personal communication between himself and decedent.

Several points of evidence are of frequent recurrence in cases in which executors or administrators are parties, and will be shortly examined. They relate principally to the mode of proof of facts which lay especially in the knowledge of the deceased, and of which the executor or administrator has no personal knowledge; and it will be seen that the general principle which underlies the rules upon this subject is that there should be an equality in the allowance of such testimony, and that, when the mouth of one party to a transaction in issue is closed by death, the other should not, except in special instances, be allowed to testify as to such transaction, on account of the danger of misrepresentation. This principle has been embodied in statutes in many states, while in a few it is not recognized, and the right of cross-examination is relied upon to prevent misstatement.<sup>1</sup>

<sup>1</sup> See post, p. 548.

**BOOKS OF ACCOUNT—ADMISSIBILITY.**

**226.** Books of account of the deceased, supported by the oath of the executor or administrator that they came to his hands as the genuine and only books of account of the deceased, that to the best of his knowledge and belief the entries are original, and contemporaneous with the facts recorded, made in the handwriting of the deceased, are admissible in evidence to prove the items of account therein stated.

It is the general rule of evidence at the present day, although an exception to the principle that a party cannot make his own declarations evidence for himself, that his books of account, if they are kept in the usual and ordinary course of business, and the entries in them are contemporaneous with the transactions which they purport to record, and are original entries, are admissible in evidence to prove those transactions, if supported by the oath of the party making the entries that the books and entries are as indicated above, and are true records of his business, although he may have no personal recollection of the truth of items specially noted.<sup>2</sup> This rule has been extended to cases where the party who made the entries is dead, and the suit is brought by or against his executor or administrator. In such a case the books of account of the deceased are admissible in evidence to prove items of work done or goods delivered, when they are supported by the oath of the executor or administrator that they came to his hands as the genuine and only books of account of the deceased, that to the best of his knowledge and belief the entries are original, and contemporaneous with the fact, and the debt is unpaid, and that the entries are in the handwriting of the deceased.<sup>3</sup> But the books must appear, on all the evidence, to have been the regular account books, kept in the usual course of business, and the entries made

<sup>2</sup> 1 Greenl. Ev. §§ 117-120.

<sup>3</sup> Pratt v. White, 132 Mass. 478; McLellan v. Crofton, 6 Greenl. (Me.) 307; Prince v. Smith, 4 Mass. 455; Odell v. Culbert, 9 Watts & S. (Pa.) 66.

at or near the time of the transactions to be proved.<sup>4</sup> The same rule also applies as to the account books of the other party to the suit. They may be given in evidence, supported by his oath; and, as will be seen later,<sup>5</sup> they are generally held to be competent, even where the statutes provide that, if one party to a transaction is dead, and the suit is by or against his executor or administrator, the surviving party is disqualified from testifying in the cause as to that transaction with the deceased.<sup>6</sup>

#### ADMISSIONS OF THE DECEASED, OR OF EXECUTOR OR ADMINISTRATOR.

**227. Admissions of the deceased as to any property which the executor or administrator claims by devolution from the deceased bind the executor or administrator. Admissions of an executor or administrator, after appointment, as to the estate, bind the estate and those claiming it through the executor or administrator.**

The executor or administrator is bound by the admissions of the deceased in regard to all property in the ownership of which he is in privity with the deceased, on the principle that when a party, by his admissions, has qualified his own right, and another succeeds to his claim as executor or administrator, he succeeds only to the right thus qualified at the time when his title commenced.<sup>7</sup> And the executor or administrator may, by his own admissions, bind the estate which he represents, but only after he has become fully clothed with the trust; and therefore admissions made by him before he has been appointed and qualified as executor or administrator, and before the beginning of the suit, cannot be received against him as the representative of the heirs, devisees, and creditors,<sup>8</sup> although they may bind him personally.

<sup>4</sup> Davis v. Sanford, 9 Allen (Mass.) 216.

<sup>5</sup> Post, p. 548.

<sup>6</sup> Dexter v. Booth, 2 Allen (Mass.) 561.

<sup>7</sup> 1 Greenl. Ev. § 189; Smith v. Smith, 3 Bing. N. C. 29; Ivat v. Finch, 1 Taunt. 141; Platner v. Platner, 78 N. Y. 90; Fellows v. Smith, 130 Mass. 378.

<sup>8</sup> 1 Greenl. Ev. § 179.

Whether the case of an executor differs in this regard from that of an administrator does not seem to have been settled in the United States. In England, as has been already seen,<sup>9</sup> the executor is considered to have many of the powers of his office vested in him by the nomination in the will, and the confirmation of the nomination by the probate court merely gives him formal authority to sue or be sued in his representative capacity. In this view of his position he undoubtedly has such an interest in and title to the estate that he could bind it by his admissions; but this view does not seem to be generally adopted in the United States, and he is in most states not considered to be fully clothed with the duties and powers of his office till he has been appointed by the probate court, and has qualified.<sup>10</sup> If an executor or administrator makes, in his representative capacity, an admission in a case by pleadings or otherwise, he is bound in his representative capacity by that admission in another case.<sup>11</sup>

#### **PARTIES AS WITNESSES IN SUITS BY OR AGAINST EXECUTORS OR ADMINISTRATORS.**

**228.** In many states, in which parties to a suit, or those interested in its event, are made by statute competent witnesses in the case, an exception is made in case of suits by or against executors or administrators. These statutes are generally in one of two forms.

- (a) In one it is provided that in actions by or against executors or administrators, in which judgment may be given either for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator or intestate, unless called to testify thereto by the opposite party, or required to testify thereto by the court. This form of the rule makes the party incompetent only for certain purposes.

<sup>9</sup> Ante, p. 247, c. 15.

<sup>10</sup> Ante p. 247, c. 15.

<sup>11</sup> Phillips v. Middlesex Co., 127 Mass. 262.



- (b) A more general form of the rule is that no party to a suit, or person directly interested in the event, shall be allowed to testify voluntarily in his own behalf when any adverse party sues or defends as executor or administrator of any deceased person. This form of the rule makes the party wholly incompetent; but it is generally narrowed, either by special exceptions admitting a party to testify as to other facts than those known only to him and the deceased, or by decisions to the same effect.

Thus, when one party is an executor, the other is not prevented from testifying to transactions or conversations with an agent of the deceased;<sup>12</sup> but the principal cannot testify to deny the authority of the agent.<sup>13</sup> In most states in which such incompetency exists it is provided that, if the executor or administrator voluntarily testifies as to such transactions or conversations himself, he thereby waives the bar, and renders the other party competent to testify to such transactions or conversations.<sup>14</sup>

The decisions relating to these statutes in the leading states will be considered in detail, as there are numerous differences in the various enactments, which renders it impracticable to classify them, although the general principles are similar, and the main object of them all is the same; that is, to preserve an equality in testifying between the parties, so that one may not testify as to facts of which the other has no knowledge.<sup>15</sup>

CALIFORNIA. The statute in this state does not apply to an action or proceeding by an executor or administrator.<sup>16</sup> Therefore, when an executor or administrator brings an action against one who is wrongfully withholding a portion of the estate, the ex-

<sup>12</sup> Pratt v. Elkins, 80 N. Y. 198.

<sup>13</sup> Woodrow v. Mansfield, 106 Mass. 112.

<sup>14</sup> Potts v. Mayer, 86 N. Y. 302; Clawson v. Riley, 34 N. J. Eq. 348; Williamson v. State, 59 Miss. 235.

<sup>15</sup> Johnson v. Heald, 33 Md. 352, 368.

<sup>16</sup> McGregor v. Donnelly, 7 Pac. 422, 67 Cal. 149; Sedgwick v. Sedgwick, 52 Cal. 336.

ecutor or administrator may testify, although the other may not;<sup>17</sup> and the executor or administrator may also, under the statutes of this state, call an adverse party to testify in behalf of the estate, although the latter could not testify of his own motion.<sup>18</sup> The statute excludes nominal parties, as well as those actually interested in the suit.<sup>19</sup> It does not exclude the account books of the adverse party when they are otherwise admissible in the action.<sup>20</sup>

ILLINOIS. The statute in this state extends to persons interested in the result of the suit.<sup>21</sup> Consequently, in an action upon a promissory note signed by a partnership against the executrix of the deceased partner, the other partners are not competent witnesses in the case, being directly interested in the result of the suit.<sup>22</sup> If an administrator presents a personal claim against the estate he represents, and another administrator is appointed to defend that special claim, it is held that an heir is not incompetent, since the action is not by the administrator in his personal capacity, but personally;<sup>23</sup> but it might be queried whether the special administrator who defends the action is not such an administrator as is within the scope of the statute. The wife of a party is so interested in the suit as not to be competent under this statute.<sup>24</sup> The statute in this state excludes nominal parties as well as those really interested in the result of the suit.<sup>25</sup> It does not apply to cases where the suit is brought by the administrator on a contract made with him, or cause of action accruing to him, although such contract or cause of action may relate to the estate. Thus, where an administrator took a mortgage on account of an indebtedness to the estate, it was held that the statute did not apply to a suit by him on the mortgage, and the other party was competent.<sup>26</sup>

<sup>17</sup> *McGregor v. Donelly*, 7 Pac. 422, 67 Cal. 149.

<sup>18</sup> *Chase v. Evoy*, 51 Cal. 618.

<sup>19</sup> *Blood v. Fairbanks*, 50 Cal. 420.

<sup>20</sup> *Roche v. Ware*, 12 Pac. 284, 71 Cal. 375.

<sup>21</sup> *Richardson v. Hadsall*, 106 Ill. 476; *Boester v. Byrme*, 72 Ill. 466.

<sup>22</sup> *Hurlbut v. Meeker*, 104 Ill. 542.

<sup>23</sup> *Douglass v. Fullerton*, 7 Ill. App. 104.

<sup>24</sup> *Warrick v. Hull*, 102 Ill. 280; *Stevens v. Hay*, 61 Ill. 399; *Crane v. Crane*, 81 Ill. 166.

<sup>25</sup> *Lowman v. Aubery*, 72 Ill. 619.

<sup>26</sup> *Roberts v. Pierce*, 79 Ill. 378.

If the executor puts in a letter by defendant, written to the deceased before his death, the defendant cannot testify as to the meaning of the letter, if that involves facts material to the case existing before the death of the deceased, for two reasons: First, that the letter must speak for itself; and, second, that his testimony relates to facts barred by the statute.<sup>27</sup> The statute covers a case where, an executor having died, the administrator de bonis non brings suit on transactions between the defendant and the executor regarding the estate.<sup>28</sup> The phrase, "shall not be allowed to testify in his own motion or on his own behalf," does not allow one party, plaintiff or defendant, to call a co-plaintiff or co-defendant, but allows only a call from the opposing party representing the deceased.<sup>29</sup> In an action by an executor upon a promissory note made to testator, the principal maker is not a competent witness for the surety, being interested in the action;<sup>30</sup> but in an action against the estate of a deceased surety the principal maker is competent, for his interest is equally balanced, since he will have to pay the note either to the payee or to the estate of the surety.<sup>31</sup> It is to be noticed that this act and its exceptions relate entirely to witnesses incompetent before its passage, and therefore, if a witness was competent before the act was passed, he remains so; and it is held that, since in equity one co-defendant might testify in behalf of another if the former had no interest in the point testified to, so he can since the statute.<sup>32</sup> The statute applies to actions by executors or administrators for damages for the killing of the deceased, although such damages are not strictly assets of the estate, since they go to the next of kin; but the suit falls under the letter of the statute.<sup>33</sup> The exception to the statute allows testimony as to facts occurring after the death of the deceased.<sup>34</sup> The executor or administrator is competent to testify in his own behalf,<sup>35</sup> and may call others interested in the

<sup>27</sup> *Lyon v. Lyon*, 3 Ill. App. 434.

<sup>30</sup> *Langley v. Dodsworth*, 81 Ill. 86.

<sup>28</sup> *Redden v. Inman*, 6 Ill. App. 55.

<sup>31</sup> *Sconce v. Henderson*, 102 Ill. 376.

<sup>29</sup> *Whitmer v. Rucker*, 71 Ill. 410.

<sup>32</sup> *Bradshaw v. Combs*, 102 Ill. 428.

<sup>33</sup> *Forbes v. Snyder*, 94 Ill. 374.

<sup>34</sup> *Straubher v. Mohler*, 80 Ill. 21; *Branger v. Lucy*, 82 Ill. 91.

<sup>35</sup> *Steele v. Clark*, 77 Ill. 471.

suit to testify for him.<sup>36</sup> If an administrator testifies to an admission by the defendant in the life of the deceased, the defendant may, under the third exception, testify as to such admission.<sup>37</sup>

INDIANA. In this state an early statute excluded the executor or administrator as well as the other party;<sup>38</sup> but, if he testified, and no objection was made, or motion to strike out his testimony, the objection was waived, and the testimony became competent.<sup>39</sup> He was also competent to testify as to facts occurring after the death of the deceased.<sup>40</sup> But now the exclusion is limited to one whose interest is adverse to the estate.<sup>41</sup> The term "party" means that the person must be substantially interested in the result of the suit, and does not include a nominal party to the record.<sup>42</sup> The contract or matter involved must be one in which the deceased had some interest, and not one transacted entirely between third parties.<sup>43</sup>

MAINE. Under the statute of this state the rule is that the executor or administrator may offer to testify himself, and, if he does so, he makes the other party competent to testify.<sup>44</sup> The rule includes the executors of one who is in prison under sentence of death, who is considered in that state as dead, and his estate is administered as such.<sup>45</sup> There is also in that state, as noted above, an exception to this general incompetency when the executor or administrator is a nominal party; but he is not such a nominal party when he brings suit in his own name on a note payable to the deceased.<sup>46</sup> If the question in suit is whether certain articles

<sup>36</sup> *Freeman v. Freeman*, 62 Ill. 189; *Remann v. Buckmaster*, 85 Ill. 403.

<sup>37</sup> *Penn v. Oglesby*, 89 Ill. 110.

<sup>38</sup> *Ginn v. Collins*, 43 Ind. 271; *Helms v. Kearns*, 40 Ind. 124.

<sup>39</sup> *Denbo v. Wright*, 53 Ind. 226.

<sup>40</sup> *Goodwin v. Goodwin*, 48 Ind. 584.

<sup>41</sup> *Louisville, N. A. & C. Ry. Co. v. Thompson*, 8 N. E. 18, 9 N. E. 357, and 107 Ind. 444.

<sup>42</sup> *Scherer v. Ingberman*, 11 N. E. 8, 12 N. E. 304, and 110 Ind. 442; *Spencer v. Robbins*, 5 N. E. 726, 106 Ind. 580.

<sup>43</sup> *Taylor v. Duesterberg*, 9 N. E. 907, 109 Ind. 170.

<sup>44</sup> *Kelton v. Hill*, 59 Me. 259; *Brooks v. Goss*, 61 Me. 307; *Haskell v. Hervey*, 74 Me. 197.

<sup>45</sup> *Knight v. Brown*, 47 Me. 468.

<sup>46</sup> *Wing v. Andrews*, 59 Me. 505.

belonged to the estate or not, both parties are competent witnesses, the case not coming under the rule.<sup>47</sup> If the surviving party to a transaction puts in evidence a memorandum in writing by the deceased, he must leave it to speak for itself, or else explain it by disinterested witnesses. He cannot testify as to its meaning himself.<sup>48</sup> But if such memoranda—for example, account books—are introduced by the executor or administrator, the other party may testify as to them.<sup>49</sup> The rule does not cover persons merely interested in the suit, but only parties to the record.<sup>50</sup> It prevents an executor or administrator from testifying in his own behalf to support a private claim of his own against the estate.<sup>51</sup> The rule also does not cover facts occurring after the death of the deceased.<sup>52</sup>

MARYLAND. Under the statute of this state it is held that a *procchein ami* is not a party to the suit.<sup>53</sup> The statute excludes the executor or administrator from testifying on his own offer, as well as the surviving party; but, if the executor takes the stand and testifies, and the other party objects to some of his testimony and not to other parts of it, the parts not excepted to will stand as evidence in the cause, the objection having been waived *pro tanto*; <sup>54</sup> but cross-examining before the auditor in an equity proceeding does not prevent taking the objection at the hearing in the equity court.<sup>55</sup> The design of the statute in admitting parties to suits to testify at their own instance has been said, in this state, to be to provide that they should do so on terms of perfect equality as to knowledge, or means of knowledge, of the subject-matter in controversy about which they were to speak, and not to allow one living to testify to his version of the transaction, when he could

<sup>47</sup> *Beach v. Pennell*, 50 Me. 587.

<sup>48</sup> *Berry v. Stevens*, 69 Me. 290.

<sup>49</sup> *Hubbard v. Johnson*, 77 Me. 139.

<sup>50</sup> *Rawson v. Knight*, 73 Me. 340; *Alden v. Goddard*, Id. 346; *Haskell v. Hervey*, 74 Me. 197.

<sup>51</sup> *Preble v. Preble*, 73 Me. 362.

<sup>52</sup> *Swasey v. Ames*, 10 Atl. 461, 79 Me. 483.

<sup>53</sup> *Trahern v. Colburn*, 63 Md. 104.

<sup>54</sup> *Dilley v. Love*, 61 Md. 607.

<sup>55</sup> *Dodge v. Stanhope*, 55 Md. 121.

not be confronted by the other or adverse party with whom the actual transaction took place, in consequence of the death or insanity of the latter;<sup>56</sup> and the general provisions removing the incompetency of parties should not be further restricted than this reason for the exception requires. When, therefore, a contract is made with a partnership composed of a great number of persons, some of whom are active in the business and others not, or some of them reside abroad, and have no personal knowledge of the transactions of the firm, in such case it would neither comport with the design of the legislature nor the reason of the thing to exclude the parties to the actual transaction simply because one of the non-active or nonresident technical co-contractors should happen to die after the contract was made.<sup>57</sup> In proceedings for probate before the will has been probated the executor nominated in the will is not under the statute, but may testify in his own behalf;<sup>58</sup> but in a proceeding by an executor or administrator against a third person for concealing part of the intestate's property the defendant is under the statute, and incompetent.<sup>59</sup> So, in a controversy between an alleged wife and the administrator of her alleged deceased husband, in regard to her right to a distributive share of the estate, she is incompetent to testify as to the marriage;<sup>60</sup> but in a contest between the wife and nephews and nieces as to the distribution of the estate they are competent witnesses to testify as to their legitimacy.<sup>61</sup> In an action on a joint note, one of the makers being dead, it is not competent for the payee and plaintiff, in order to remove the statute of limitations, to testify to a payment made by the deceased maker, and indorsed on the note in his own handwriting.<sup>62</sup>

**MASSACHUSETTS.** At the present time, in Massachusetts, there is no statutory provision affecting the competency of wit-

<sup>56</sup> *Johnson v. Heald*, 33 Md. 352, 368.

<sup>57</sup> *Hardy v. Chesapeake Bank*, 51 Md. 596.

<sup>58</sup> *Schull v. Murray*, 32 Md. 9.

<sup>59</sup> *Cannon v. Crook*, 32 Md. 482.

<sup>60</sup> *Denison v. Denison*, 35 Md. 361. See *Redgrave v. Redgrave*, 38 Md. 93.

<sup>61</sup> *Jones v. Jones*, 36 Md. 447.

<sup>62</sup> *Miller v. Motter*, 35 Md. 428.

nesses or the admissibility of testimony in cases where an executor or administrator is a party.<sup>63</sup> Until recently, however, there was a statute regulating this subject, and the decisions under it are given, being applicable to similar statutes. The statute referred to was that, where one of the original parties to the contract or cause of action is dead, the other party shall not be admitted to testify in his own favor; and, where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living, and competent to testify.<sup>64</sup> Under this statute the following rules were decided: When the cause of action is a contract of sale, made through an agent of one of the parties, the other party having died, and his executor being made a party, the alleged principal cannot be a witness in his own behalf to deny the authority of the agent.<sup>65</sup> An executor is not competent to testify in his own behalf to an item in his accounts consisting of a claim of his own against the deceased for services rendered during her life, when the question is the allowance of those accounts;<sup>66</sup> but where the question is the correctness of his accounts, and he testifies without objection that a debt due by him to the testatrix had been paid by him to her before her death, it is too late to raise objection to the competency of the witness on an appeal.<sup>67</sup> The widow of the deceased may testify in behalf of the executor as to conversations between the deceased and the defendant, and the defendant is not competent to testify in rebuttal of her testimony.<sup>68</sup> The rule does not exclude the party from introducing his books of account, on the principle before stated, with his suppletory oath, although the other party is an executor or administrator.<sup>69</sup> The rule also affects only parties to the record, and therefore, in a hearing on an application by an administratrix for leave to sell real estate for the payment of debts, it was held

<sup>63</sup> Pub. St. c. 169, § 18.

<sup>64</sup> Gen. St. c. 131, § 14.

<sup>65</sup> *Woodrow v. Mansfield*, 106 Mass. 112.

<sup>66</sup> *Ela v. Edwards*, 97 Mass. 318.

<sup>67</sup> *Granger v. Bassett*, 98 Mass. 462.

<sup>68</sup> *Robinson v. Talmadge*, 97 Mass. 171.

<sup>69</sup> *Dexter v. Booth*, 2 Allen, 561.

that a creditor of the estate was a competent witness to prove his own debt.<sup>70</sup> The rule as to the competency of husband and wife as witnesses under this statute, and that governing the competency of husband and wife for or against each other, is that neither husband nor wife is competent to testify as to private conversations with each other; and this incompetency extends as well after the coverture is ended as before, and therefore the widow cannot testify as to such conversations after the death of her husband, and vice versa the husband cannot testify to such conversations after the death of the wife;<sup>71</sup> but as to other conversations either is competent.<sup>72</sup> And in an action by the widow against the executor in his personal capacity for trover in taking certain property of her own, she may testify in her own behalf, though it seems that, if she claims the property as a gift from the husband, and this fact is put in issue, she would not be competent to testify to the gift.<sup>73</sup> In a case where the action was by the husband, being administrator of his wife, against the executor of one who had deposited money in a savings bank in trust to pay the interest to the depositor for life, and after her death to pay the principal to the wife, it was held that the cause of action in issue and on trial was the creation of the trust, and that the husband was therefore incompetent to testify.<sup>74</sup> A further exception to this statute was made by a later statute, which provided that, whenever the contract or cause of action in issue and on trial was made or transacted with an agent, the death or insanity of his principal shall not prevent any party to the suit or proceeding from being a witness in the case, provided such agent shall be living and competent to testify.<sup>75</sup> It has been held that the statute was intended to put the two parties to a suit upon terms of substantial equality in regard to the opportunity of giving testimony. In general, when parties have contracted with each other, each is supposed to have an equal knowledge of the transaction, and both, if living and of sound

<sup>70</sup> *Chamberlin v. Chamberlin*, 4 Allen, 184.

<sup>71</sup> *Dexter v. Booth*, 2 Allen, 559.

<sup>72</sup> *Robinson v. Talmadge*, 97 Mass. 171.

<sup>73</sup> *Baxter v. Knowles*, 12 Allen, 114.

<sup>74</sup> *Ayres v. Ayres*, 11 Gray, 130.

<sup>75</sup> St. 1865, c. 207, § 1.



mind, are allowed to testify. But, if one is precluded from testifying by death or insanity, the other is not entitled to the undue advantage of being a witness in his own case. Where, however, a party has contracted through an agent, if the agent is living, the death of the principal does not deprive his personal representative of the testimony of the one most fully acquainted with the facts of the case, and the other party may, without injustice, be admitted as a witness; but the exception does not apply to an action by an agent against his principal for the services rendered by the agent. If the principal is dead, the agent cannot testify in his own behalf.<sup>76</sup> And the rule does not, in any case, apply to contracts made by the executor or administrator, or torts done by or against him. As to suits on such contracts, he is a competent witness.<sup>77</sup>

**MICHIGAN.** The statute in this state only applies in cases where the estate is in some way one of the parties, and the heirs, assigns, devisees, or legatees are the others. It does not apply when a will is presented for probate, and the probate is contested. In such a case the proponent of the will may testify as to an agreement between himself and the testator, by which the latter agreed to leave him all the property in the manner in which the will disposed of it;<sup>78</sup> or a legatee may testify as to conversations with the deceased about the will.<sup>79</sup> It covers only parties to the record, and as to them only matters shown to be within the knowledge of the deceased.<sup>80</sup> If the representative of the deceased puts into the case admissions of the other party as to facts under the statute, he so far waives the rule, and the surviving party may explain these admissions.<sup>81</sup>

**MINNESOTA.** The surviving party to a contract cannot testify in his own favor as to the contract, even though he is not a party to the record.<sup>82</sup> If the introduction of evidence by the de-

<sup>76</sup> *Brown v. Brightman*, 11 Allen, 226.

<sup>77</sup> *Blood v. French*, 9 Gray, 197; *Howe v. Merrick*, 11 Gray, 129; *Palmer v. Kellogg*, 11 Gray, 27.

<sup>78</sup> *Brown v. Bell*, 24 N. W. 824, 58 Mich. 58.

<sup>79</sup> *Schofield v. Walker*, 24 N. W. 624, 58 Mich. 98.

<sup>80</sup> *Bassett v. Shepardson*, 17 N. W. 217, 52 Mich. 3.

<sup>81</sup> *Smith's Appeal*, 18 N. W. 195, 52 Mich. 415.

<sup>82</sup> *Allen v. Baldwin*, 22 Minn. 397.

ceased's agent as to a transaction within his knowledge makes the testimony of the survivor admissible, it will be so admissible even if the agent's testimony is not in fact introduced.<sup>83</sup> Thus rule excludes all that took place at the time of making the contract.<sup>84</sup>

**NEW HAMPSHIRE.** The statute in this state applies to a common-law action for an account, as well as in other suits.<sup>85</sup> The administrator or executor is the only one who can object to the other party testifying, and, if he does not, or if he consents, such testimony is competent.<sup>86</sup> The rule does not cover parties in interest, but only parties to the record, except as to the administrator or executor;<sup>87</sup> nor does it cover suits against the executor or administrator personally, as when it is brought for a tort committed by him;<sup>88</sup> nor where the executor or administrator is only a nominal party.<sup>89</sup> But in this state the court has a discretion to allow the party to testify when it clearly appears that injustice may be done without his testimony;<sup>90</sup> but when the facts to be testified to were wholly within the knowledge of the deceased and the offered witness, it is a proper exercise of that discretion to refuse to let the witness testify, as that would give him, being a party, an unfair advantage;<sup>91</sup> but this discretion is to be exercised with caution.<sup>92</sup> And the facts showing that injustice will be done by not allowing the other party to testify must appear upon the evidence in the case, and cannot be proved by affidavit of the party offering himself as a witness.<sup>93</sup> The rule does not prevent the offering of books of account with the party's suppletory oath, as was allowed at common law;<sup>94</sup> nor does it prevent the wife of the party from testifying as to such matters as she may be otherwise competent to

<sup>83</sup> *Bigelow v. Ames*, 18 Minn. 527 (Gil. 471).

<sup>84</sup> *Johnson v. Coles*, 21 Minn. 108.

<sup>85</sup> *English v. Porter*, 63 N. H. 213.

<sup>86</sup> *Marcy v. Amazeen*, 61 N. H. 133; *Burns v. Madigan*, 60 N. H. 197.

<sup>87</sup> *Wilson v. Russell*, 61 N. H. 355.

<sup>88</sup> *Harrington v. Tremblay*, 61 N. H. 413.

<sup>89</sup> *Drew v. McDaniel*, 60 N. H. 482.

<sup>90</sup> *Cochran v. Langmaid*, 60 N. H. 571.

<sup>91</sup> *Page v. Whidden*, 59 N. H. 511.

<sup>92</sup> *Hoit v. Russell*, 56 N. H. 563.

<sup>93</sup> *Harvey v. Hilliard*, 47 N. H. 553.

<sup>94</sup> *Snell v. Parsons*, 59 N. H. 521.

testify to, she not being a party to the case.<sup>95</sup> The election of the administrator or executor to testify himself allows the other party to testify; but when the executor or administrator is summoned by the other side, and compelled to testify, this is not such an election as allows the party summoning him to testify.<sup>96</sup> The rule applies to proceedings in the probate court, as well as to suits at common law. Thus, where an administration account was being settled, it was held that an heir who had become party to the record was incompetent to testify.<sup>97</sup>

NEW JERSEY. Where a defendant in a suit in equity dies, and his executor is substituted, the complainant cannot be a witness in his own behalf, unless the sworn answer of the defendant has already been filed, in which case he is admitted by statute to disprove the parts of the answer responsive to the bill.<sup>98</sup> If the answer, though sworn to, is not evidence,—as, if it does not state facts in the knowledge of the defendant, or if it is not sworn to, or if the bill asks an answer not sworn to,—then the complainant is not competent.<sup>99</sup> If an executor or administrator is a witness in his own behalf, under the statute authorizing such testimony, the opposite party is thereby made competent, and may testify; but he is not so competent until after the executor or administrator has been sworn in the case, and his testimony, if given before, is incompetent, although it is incumbent on the executor or administrator to insist upon its incompetency, or he will be deemed to have waived his objection.<sup>100</sup> Thus if, in an action against an executor or administrator, the complainant testifies in his own behalf before the defendant does, but the latter is subsequently sworn as a witness, he must move to suppress the complainant's testimony, and to withdraw his own, if he wishes to insist upon the incompetency of the plaintiff's evidence; otherwise he will be deemed to have

<sup>95</sup> *Clements v. Marston*, 52 N. H. 36.

<sup>96</sup> *Harvey v. Hilliard*, 47 N. H. 553.

<sup>97</sup> *Perkins v. Perkins*, 46 N. H. 110.

<sup>98</sup> *Sweet v. Parker*, 22 N. J. Eq. 455; *Lanning v. Lanning's Adm'r*, 17 N. J. Eq. 228.

<sup>99</sup> *Sweet v. Parker*, *supra*.

<sup>100</sup> *Walker v. Hill's Ex'rs*, 22 N. J. Eq. 513; *Shepherd's Ex'x v. McClain*, 18 N. J. Eq. 128; *Hartman v. Alden*, 34 N. J. Law, 518, 523.

waived objection to it.<sup>101</sup> The rule applies only to parties who are materially interested in the suit, and not to one who is wrongly made a party, having no interest in the case.<sup>102</sup> If one party dies after the other has been examined, the testimony so given remains competent, because competent when taken.<sup>103</sup> If a defendant is ordered to attend court and be examined concerning an account, and the complainant dies after the order is passed and before the defendant is examined, the examination is not competent, since the order is affected by the incompetency of the witness arising after it was passed.<sup>104</sup> The rule applies to proceedings in the orphans' court on an executor's account, when the executor offers to testify to transactions with the testator,<sup>105</sup> but does not apply to transactions with a deceased executor in regard to the estate he represented.<sup>106</sup>

NEW YORK. Under the statute in this state, when the probate of a will is contested, legatees are incompetent to testify for the proponent as to personal transactions or communications between them and the testator; but, if the legatee releases all interest in the will, he becomes competent.<sup>107</sup> An executor and proponent of the will is not disqualified from testifying as to such transactions, nor does his right to commission render him incompetent.<sup>108</sup> Under this statute, the interest which will disqualify a person not a party must be an interest in the event of the particular action pending, and such that the witness will either gain or lose by the direct legal effect of the judgment, or that the record will be legal evidence, and operate for or against him in some other action; for example, a surety on a probate bond, who is bound by the surrogate's decree upon the accounting.<sup>109</sup> If the testimony of the

<sup>101</sup> *Walker v. Hill's Ex'rs*, *supra*.

<sup>102</sup> *Harrison's Adm'x v. Johnson*, 18 N. J. Eq. 420.

<sup>103</sup> *Marlatt v. Warwick*, 18 N. J. Eq. 108.

<sup>104</sup> *Halsted v. Tyng*, 29 N. J. Eq. 86.

<sup>105</sup> *Smith v. Burnet*, 34 N. J. Eq. 219.

<sup>106</sup> *Palmateer v. Tilton*, 5 Atl. 105, 40 N. J. Eq. 555.

<sup>107</sup> *Loder v. Whelpley*, 18 N. E. 874, 111 N. Y. 239; *Lane v. Lane*, 95 N. Y. 501.

<sup>108</sup> *In re Will of Wilson*, 8 N. E. 731, 103 N. Y. 374; *Loder v. Whelpley*, 18 N. E. 874, 111 N. Y. 239.

<sup>109</sup> *Nearpass v. Gilman*, 10 N. E. 894, 104 N. Y. 510; *Miller v. Montgomery*, 78 N. Y. 282; *Church v. Howard*, 79 N. Y. 420.

deceased is put in evidence as to such transactions, the testimony of the party surviving may be given to contradict it. Thus, when one of two defendants in an action on a promissory note testified as to its consideration, and died before a second trial, in which trial the plaintiff put in evidence the testimony of the deceased defendant, both direct and cross, it was held competent for the surviving defendant to contradict the testimony so put in by his own testimony as to the transactions referred to.<sup>110</sup> A surviving party may testify as to the fact that he had a conversation with the deceased, if that fact is immaterial, and has no effect;<sup>111</sup> but he cannot testify what the conversation was, nor can he testify as to the fact of there having been a conversation, if that is a material fact in the case.<sup>112</sup> If he was only a listener at a conversation between the deceased and some other person, he may testify as to that conversation.<sup>113</sup> In this state, also, it is held that the rule does not extend to transactions with clerks or agents of the deceased, and that evidence as to such transactions is admissible.<sup>114</sup> The rule does not extend so far as to prevent the surviving party from testifying to facts which inferentially show that such a transaction did or did not take place. Thus, where a witness for one party testified that such a conversation did take place between the deceased and the other party, at which he was present, and what the conversation was, it was held that facts inferentially showing that the witness testified falsely might be testified to by the surviving party, although they tended to prove that the conversation did not take place. Such, for instance, would be testimony that the parties to the alleged conversation were at the time in different places.<sup>115</sup> In a case where the action was on a loan, which was alleged to have been made by a check given by plaintiff to defendant's intestate, the defense being that the check concerned the affairs of a corporation of which the plain-

<sup>110</sup> *Potts v. Mayer*, 86 N. Y. 302.

<sup>111</sup> *Hier v. Grant*, 47 N. Y. 278.

<sup>112</sup> *Maverick v. Marvel*, 90 N. Y. 656.

<sup>113</sup> *Badger v. Badger*, 88 N. Y. 559; *Cary v. White*, 59 N. Y. 336; *Hildebrant v. Crawford*, 65 N. Y. 107.

<sup>114</sup> *Pratt v. Elkins*, 80 N. Y. 198.

<sup>115</sup> *Pinney v. Orth*, 88 N. Y. 447.

tiff was treasurer and the defendant's intestate president, it was held that it was incompetent for the plaintiff to testify whether the check had any reference to the affairs of the company, since the answer to such a question involved the nature of the transaction with the deceased when the check was given.<sup>116</sup> The language of the rule as stated in the existing code covers all grantors in the title, and not only the immediate grantor of the party.<sup>117</sup>

OHIO. The person who is incompetent under this statute may nevertheless be called by the executor or administrator, and compelled to testify as to facts which he would be incompetent to testify to on his own motion.<sup>118</sup> In actions in which a surviving partner is a party, admissions by or transactions with the deceased are competent if made in the presence of the surviving partner.<sup>119</sup> The death of an agent has no effect upon the competency of parties, or testimony in a case in which he is not a party.<sup>120</sup> The administrator or executor is competent to testify in his own behalf as to facts occurring before the death of his intestate or testator. And, if he testifies as to transactions and conversations between the deceased and the adverse party, the adverse party thereby gains the right to testify to the same transactions or conversations.<sup>121</sup>

RHODE ISLAND. The statute in this state has been the subject of discussion in only a few cases. In one it was decided that this statute did not apply to proceedings upon the probate of a will, either original or appellate, for the executor is not executor until the final affirmance of his appointment. The court also say that the statute is intended to apply only when the executor is party as executor representing the estate.<sup>122</sup> It has also been held that the statute covers transactions occurring between the executor or administrator before his appointment and the other party

<sup>116</sup> *Koehler v. Adler*, 91 N. Y. 657.

<sup>117</sup> *Pope v. Allen*, 90 N. Y. 298.

<sup>118</sup> *Roberts v. Briscoe*, 10 N. E. 61, 44 Ohio St. 600.

<sup>119</sup> *Harrison v. Neely*, 41 Ohio St. 334.

<sup>120</sup> *First Nat. Bank v. Cornell*, 41 Ohio St. 401; *Cochran v. Almack*, 39 Ohio St. 314.

<sup>121</sup> *Rankin v. Hannan*, 38 Ohio St. 438.

<sup>122</sup> *Hamilton v. Hamilton*, 10 R. I. 540.

to the suit, although such transactions occurred after the death of the testator or intestate.<sup>123</sup>

VERMONT. The intention of the statute in this state is to preserve equality between the parties, and it is held that the words "contract in issue" mean the same as contract in dispute or in question, and relate to the substantial issues made by the evidence, as well as to the formal issues made by the pleadings,<sup>124</sup> and that the term "the other party" means the other party to the contract in issue, and not the other party to the record.<sup>125</sup> The rule does not prohibit the wife of a deceased person from testifying as to facts which she is otherwise competent to testify to, the contract in issue not being between herself and her husband.<sup>126</sup> Nor does it apply to agents by whom the contract was made.<sup>127</sup> In this state, if a party to the case testifies and dies, it is by statute provided that, if his testimony is reproduced in another trial by stenography or in writing, the other party may testify in opposition to it; but it is held that this statutory provision does not extend to cases where the testimony is reproduced by witnesses from recollection only, and that in such case the other party cannot testify in opposition to the testimony so reproduced.<sup>128</sup> The statute does not exclude persons interested in the suit unless they were parties to the cause of action in issue and on trial.<sup>129</sup> Nor does it exclude the offer of account books with the suppletory oath of the party producing them.<sup>130</sup> The expression "contract or cause of action in issue or on trial" excludes all contracts or issues which are collateral to the contract or cause of action being enforced. If the parties to the main contract are alive, they may both testify as

<sup>123</sup> *Brown v. Lewis*, 9 R. I. 498.

<sup>124</sup> *Barnes v. Dow*, 10 Atl. 258, 59 Vt. 545; *Richardson v. Wright*, 5 Atl. 287, 58 Vt. 370; *Wiley v. Hunter*, 57 Vt. 489.

<sup>125</sup> *Barnes v. Dow*, 10 Atl. 258, 59 Vt. 545, 546.

<sup>126</sup> *Stowe v. Bishop*, 3 Atl. 494, 58 Vt. 500.

<sup>127</sup> *Kittell v. Railroad Co.*, 56 Vt. 106; *Lytle v. Bond's Estate*, 40 Vt. 618; *Poquet v. Town of North Hero*, 44 Vt. 91; *Hollister v. Young*, 42 Vt. 403; *Pember v. Congdon*, 55 Vt. 59.

<sup>128</sup> *Blair v. Ellsworth*, 55 Vt. 417.

<sup>129</sup> *Lytle v. Bond's Estate*, 40 Vt. 618.

<sup>130</sup> *Thrall v. Seward*, 37 Vt. 573; *Johnson v. Dexter*, 37 Vt. 641; *Hunter v. Kittredge's Estate*, 41 Vt. 359; *Woodbury v. Woodbury*, 48 Vt. 94.

to it.<sup>131</sup> If the administrator puts in evidence a memorandum in writing of the deceased, the other party is held not to be competent to testify to explain the writing, or to state what was said or done on the occasion of giving it.<sup>132</sup> The surviving party cannot make himself competent as a witness by putting in evidence testimony of the deceased in another case, upon the cause of action on trial.<sup>133</sup> The statute in the state continues the disability as to all acts down to the appointment of the administrator or the probate of the will.<sup>134</sup> The rule does not extend to contracts or causes of action having three or more parties, for, if the action is against one of two surviving parties to the contract, the other party is competent to testify, even as to transactions between him and the deceased party alone.<sup>135</sup>

**WISCONSIN.** In this state it is held that in an action for board and lodging furnished to the deceased it is competent for the plaintiff to show how long the defendant's intestate boarded with plaintiff, and the kind of board furnished by the plaintiff, since these are not transactions with the deceased, but independent facts.<sup>136</sup> And, in general, the fact of furnishing supplies or goods to the deceased, from which the law implies a promise to pay, is not held to be covered by the rule in this state.<sup>137</sup> And it has been held that a letter is not within this exclusion, because a personal transaction means a face to face transaction;<sup>138</sup> and that such evidence is admissible when it is an admission against his interest, as of a payment of money due to him.<sup>139</sup> If evidence barred by the rule is put in without objection, and then evidence to rebut it is introduced, the objection to it is waived.<sup>140</sup> If a third person is present at such a conversation, he or she may testify to it, although

<sup>131</sup> *Cole v. Shurtleff*, 41 Vt. 311; *Morse v. Low*, 44 Vt. 561.

<sup>132</sup> *Woodbury v. Woodbury*, 48 Vt. 94.

<sup>133</sup> *Walker v. Taylor*, 43 Vt. 612.

<sup>134</sup> *Ford's Ex'rs v. Cheney*, 40 Vt. 153; *Roberts v. Lund*, 45 Vt. 82.

<sup>135</sup> *Read v. Sturtevant*, 40 Vt. 521; *Dawson v. Wait*, 41 Vt. 626.

<sup>136</sup> *Pritchard v. Pritchard*, 34 N. W. 506, 69 Wis. 373.

<sup>137</sup> *Belden v. Scott*, 27 N. W. 356, 65 Wis. 426.

<sup>138</sup> *Daniels v. Foster*, 26 Wis. 686.

<sup>139</sup> *Crowe v. Colbeth*, 24 N. W. 478, 63 Wis. 643.

<sup>140</sup> *Phillips v. McGrath*, 22 N. W. 169, 62 Wis. 124.



it may be the wife of the deceased person, without rendering competent the testimony of the surviving party.<sup>141</sup> The payee of a note may testify with what kind of ink he signed it, whether he struck out any printed words, and others facts bearing on the question of alteration.<sup>142</sup> And, if a question is put which does not appear to require an answer which is objectionable under the rule, it is error to exclude the question.<sup>143</sup> A defendant who is not interested in the suit, but is a party, cannot testify under this rule.<sup>144</sup> A partner, while acting in the affairs of the partnership, is so far an agent of the other partners as to come under the section of this statute applying to agents.<sup>145</sup>

### COSTS.

**229. The payment or recovery of costs by an executor or administrator is generally regulated by statutes in the United States. The principle running through the statutes is that, if the executor or administrator is successful, he may recover costs. If he is unsuccessful, he must pay costs, but will be allowed to charge them against the estate in his probate accounts, unless the probate court is of opinion that the suit was prosecuted or defended without reasonable cause for so doing.**

The subject of the taxation of costs in suits by and against executors and administrators is one which is regulated very generally by statute in the United States, and is so far a matter of local practice that an extended investigation of the statutes would be inconsistent with the purpose of this work. In England, in the early practice, an executor or administrator might recover costs if he was successful in a suit brought by him; but, if he was unsuccessful, he was not liable for costs. But now he is, in the lat-

<sup>141</sup> *Burnham v. Mitchell*, 34 Wis. 117.

<sup>142</sup> *Page v. Danaher*, 43 Wis. 221.

<sup>143</sup> *Adams v. Allen*, 44 Wis. 93.

<sup>144</sup> *Knox v. Bigelow*, 15 Wis. 415.

<sup>145</sup> *Rogers v. Brightman*, 10 Wis. 55.

ter case, by statute, liable, as if he were suing in his own name.<sup>146</sup> In actions against an executor or administrator in England, if he is successful, he is entitled to his costs; if unsuccessful, he is liable to costs as an ordinary defendant.<sup>147</sup> In equity the subject of costs is in the discretion of the court. Generally speaking, in a suit against an executor or administrator, the unsuccessful party will have to bear the costs of the proceedings.<sup>148</sup> In general administration suits, which have been before alluded to, the costs of the personal representatives are generally provided for as between attorney and client, and are a first charge on the estate, unless the suit was occasioned by the negligence or misconduct of the executor or administrator, in which case he will be deprived of his costs. And, if he has been guilty of fraud or neglect of duty in managing the estate, he will be required to pay the costs of the suit.<sup>149</sup> The general principle which runs through the statutes of the United States is that the ultimate personal responsibility of an executor or administrator for costs of suits brought by or against him only accrues in cases where the bringing or defending of the suit was a case of mismanagement of the estate, or was done in bad faith.<sup>150</sup> In all other cases the costs are either taxed against the estate only, as is generally the case where the demand sued on arose in the life of the deceased, and the suit is by or against the executor or administrator in his representative capacity,<sup>151</sup> or, if taxed and recovered against him personally, he is allowed to charge them in his probate accounts, and reimburse himself from the estate.<sup>152</sup> The statutes, however, are not in strict accord on this matter, at least in the manner in which the results above stated are reached; and in any particular case the statute

<sup>146</sup> St. 3 & 4 Wm. IV. c. 42, § 31; Williams, Ex'rs, 1895.

<sup>147</sup> Williams, Ex'rs, 1978, 1979.

<sup>148</sup> Williams, Ex'rs, 2034.

<sup>149</sup> Williams, Ex'rs, 2035, 2036.

<sup>150</sup> *Raugh v. Weis*, 37 N. E. 331, 138 Ind. 42; *McBride v. Chamberlain* (Sup.) 26 N. Y. Supp. 94; *Davis v. Myers*, 33 N. Y. Supp. 352, 86 Hun, 236; *Reay v. Butler*, 33 Pac. 1134, 99 Cal. 477; *Stevens v. Railroad Co.*, 37 Pac. 146, 103 Cal. 252.

<sup>151</sup> *Mullen v. Guinn*, 34 N. Y. Supp. 625, 88 Hun, 131.

<sup>152</sup> See cases *supra*, in note 150.

of the state in question should be consulted. In Maine, Maryland, Massachusetts, Michigan, New York, Ohio, and Wisconsin the statutes in terms make the ultimate responsibility of the executor or administrator for costs depend upon the reasonableness and good faith of his conduct.<sup>153</sup> In several states the courts are given full or partial discretion as to the awarding of costs, and the matter is left without statutory direction.<sup>154</sup> In one the executor or administrator is personally liable for costs allowed against him,<sup>155</sup> and in one state he is protected from all liability.<sup>156</sup>

<sup>153</sup> Me. Rev. St. c. 87, § 2; Md. Rev. Code, art. 50, § 146; Mass. Pub. St. c. 166, §§ 6, 9; *Hardy v. Call*, 16 Mass. 530; Mich. Ann. St. § 5961; N. Y. Code Civ. Proc. §§ 1835, 1836; Ohio Rev. St. §§ 6106, 6107; Wis. Rev. St. § 3264.

<sup>154</sup> Cal. Code Civ. Proc. § 1720; Ill. Ann. St. c. 3, par. 63; N. J. Revision, tit. "Orphans' Court," § 168; R. I. Pub. St. c. 217, § 18.

<sup>155</sup> Vt. Rev. Laws, §§ 2145, 2156.

<sup>156</sup> Ind. Rev. St. § 2291.



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